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Supreme Court, U.S.
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In The

Supreme Court of the United States

ERNESTO R. VASQUEZ,

Petitioner,

v.

LOS ANGELES COUNTY ("LA County"), DON KNABE, GLORIA MOLINA, YVONNE B. BURKE, ZEV YAROSLAVSKY, and MICHAEL D. ANTONOVICH, in their official capacities as Supervisors, LA County,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001
Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

This Court's flawed Establishment Clause jurisprudence has promoted the removal of religious symbols from public places and the purging from our public conscience of Christianity's role in our Nation's history. The current approach to deciding cases under the Establishment Clause has created a jurisprudence that is hostile toward religion. This case presents an opportunity for the Court to abandon its much maligned jurisprudence in favor of one that respects our Nation's religious heritage.

Petitioner Ernesto R. Vasquez is challenging the Los Angeles County's policy decision to remove a small cross from its official seal. For nearly 50 years, the cross on the county seal stood as a recognition of the influence of the church and the missions of California. In June 2004, however, this small cross became the target of an official policy that singled it out for removal simply because it was a Christian symbol.

1. Whether a constitutional challenge to a government policy that targets a symbol for removal from public places because it is Christian states a claim under the Establishment Clause.

2. Whether the Ninth Circuit erred in dismissing Petitioner's complaint for failure to state a claim when it weighed competing inferences drawn from the factual allegations in the pleadings and accepted Respondents' contrary evidence.

PARTIES TO THE PROCEEDING

The Petitioner is Ernesto R. Vasquez ("Petitioner").

The Respondents are Los Angeles County ("LA County"), Don Knabe, Gloria Molina, Yvonne B. Burke, Zev Yaroslavsky, and Michael D. Antonovich, in their official capacities as Supervisors, LA County ("Respondents").

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OPINIONS BELOW

The opinion, App. 3a, appears at 487 F.3d 1246. The unpublished district court opinion appears at App. 29a.

JURISDICTION

The opinion of the panel was issued on May 15, 2007. A petition for panel rehearing and a petition for rehearing en banc were denied on July 5, 2007. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

STATEMENT OF THE CASE

Petitioner is an adult resident of LA County, a state and municipal taxpayer, and a citizen of the United States. He is employed by the county and has daily contact with the County of Los Angeles Official Seal ("LA County Seal"). App. 6a, 8a, 55a.

Petitioner is a devout Christian, and he objects to Respondents' removal of the cross from the LA County Seal because this official policy conveys a message of disapproval of and hostility toward Christianity and

sends a clear message to him and other Christians that they are outsiders, not full members of the LA County community. Additionally, Petitioner objects to the use of his tax money and the expenditure of municipal and/or state funds and tax dollars to support Respondents' policy. App. 6a, 55a

Respondents Knabe, Molina, Burke, Yaroslavsky, and Antonovich are Supervisors for Respondent LA County and members of the LA County Board of Supervisors, which is the governing body for LA County. As Supervisors, these Respondents are responsible for creating, adopting, and implementing the policies, practices, and customs of LA County, including the policy to remove the cross from the county seal. App. 4a, 56a.

Respondent LA County officially adopted the former LA County Seal in 1957. The seal was displayed on county buildings, vehicles, flags, stationary, forms, commendations, uniforms, and elsewhere throughout the county. App. 14a, 56a-57a. The revised seal without the cross is similarly displayed.

The LA County Seal, as adopted in 1957, contained symbols of historical and cultural significance to the residents of the county and did not convey an impermissible, state-sponsored religious message. Included in the LA County Seal was a small cross, which represented the influence of the church and the missions of California. The LA County Seal also included an image of the goddess Pomona standing on the shore of the Pacific Ocean with the San Gabriel Mountains in the background; engineering

instruments that related to the industrial construction complex of LA County and LA County's contribution to the conquest of space; a depiction of the San Salvador, the Spanish galleon that Cabrillo sailed into San Pedro Harbor on October 8, 1542; a tuna that represented the fishing industry of LA County; a depiction of Pearlette, a championship cow, which represented the dairy industry; a depiction of the Hollywood Bowl, which indicated cultural activities, with two stars representing LA County's motion picture and television industry; and images of oil derricks that were symbolic of the oil fields that were discovered on Signal Hill. Surrounding the seal were the words "County of Los Angeles California." App. 4a-5a, 57a.

On June 1, 2004, Respondents created and adopted an official policy of singling out the cross for removal from the LA County Seal because it was a Christian symbol. Pursuant to this policy, however, Respondents did not single out the large and prominent image of the polytheistic goddess Pomona for such treatment. App. 5a, 57a-58a.

The LA County Seal, as adopted in 1957, did not convey an impermissible religious message; it conveyed a historical and cultural message that was important to county residents, including Petitioner. However, by creating and adopting a policy that targeted the cross for removal and exclusion as one of the historical and cultural symbols of the seal because it is a Christian symbol, Respondents have now conveyed a message of *hostility* toward Christianity. App. 4a-6a, 57a.

Respondents' purpose for creating and adopting their official policy to target the cross for disparate and hostile treatment was anti-Christian and motivated by hostility toward Christianity and its cultural and historical significance to the residents of LA County. App. 5a-6a. This policy was improperly influenced by the American Civil Liberties Union ("ACLU"), an organization with a reputation for seeking to remove Christian symbols and Christian influences from public places.[1] App. 5a-6a, 57a-59a.

The effect of Respondents' policy is to convey a message of disfavor of and hostility toward Christianity, thereby sending a message to Christians, including Petitioner, that they are outsiders, not full members of the political community. App. 6a.

As Petitioner alleged in his First Amended Complaint, the implementation of Respondents' policy would cause additional and repeated injury to Petitioner each day that he goes to work for LA County or is otherwise exposed to the anti-Christian message conveyed by the seal without the cross. As a consequence of Respondents' policy and its implementation, Petitioner will alter his behavior to avoid this additional, direct injury. Moreover, Respondents' anti-Christian policy is funded by and has resulted in the expenditure of thousands of municipal and/or state funds and tax dollars, causing further direct injury to Petitioner. App. 6a, 8a, 56a, 59a-60a.

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[1] The ACLU did not object to the large image of the polytheistic goddess Pomona.

After the filing of Petitioner's First Amended Complaint, Respondents implemented their policy and removed the cross from the official county seal, thereby causing the irreparable harm alleged in the First Amended Complaint, including the harm caused by the expenditure of thousands of tax dollars. And this harm continues today.[2] App. 5a.

Petitioners timely filed a petition for panel rehearing and a petition for rehearing en banc. On July 5, 2007, the petitions were denied.

REASONS FOR GRANTING THE PETITION

I. THE ESTABLISHMENT CLAUSE SHOULD NOT TOLERATE POLICY DECISIONS THAT EXHIBIT HOSTILITY TOWARD OR DISFAVOR OF THE CHRISTIAN RELIGION.

This Court has previously stated that when evaluating claims under the Establishment Clause "the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and guard against other different, yet equally important, constitutional injuries." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.

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[2] Respondents also replaced the goddess Pomona with an "image of a Native American Woman holding a basket." App. 5a. And they removed the images of the oil derricks and added the image of a building claimed to be an image of a mission, which does not contain a cross. App. 5a, 18a. These changes were not part of the policy adopted on June 1, 2004, but were made subsequent to the filing of this lawsuit and with the approval of the ACLU.

290, 314 (2000) (internal citation omitted). One such way in which these "values" are eroded is by a government policy decision that singles out religious symbols for removal from public places because they are Christian. An evenhanded application of prior precedent should compel a reversal in this case. Unfortunately, with little exception, the application of this Court's modern day Establishment Clause jurisprudence has led the law to exhibit hostility toward religion, thereby promoting such policy decisions. Consequently, a substantial revision of this Court's jurisprudence is in order.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court stated:

> It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

Id. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("In our Establishment Clause cases we have often stated the principle that the First

Amendment forbids an official purpose to disapprove of a *particular* religion or of religion in general.") (emphasis added).

Despite an occasional appearance of neutrality and suggestion that the Constitution is not hostile toward religion, the reality is that this Court's Establishment Clause jurisprudence is frequently used as a blunt instrument against all thing religious—particularly those that are Christian. This case is just such an example.

While some on this Court still believe that our Constitution "affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any," *Lynch*, 465 U.S. at 673, this case will afford the Court the opportunity to breathe new and lasting life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts. As this case shows, the Court's prophetic observation in *Lynch* that "[a]nything less would require the callous indifference [that] was never intended by the Establishment Clause," thereby bringing "us into war with our national traditions" has come to fruition. It is time to reverse this harmful and divisive trend.

II. THE PANEL'S DECISION EVISCERATES CLAIMS ADVANCED UNDER A HOSTILITY TOWARD RELIGION THEORY.

By dismissing Petitioner's allegations of an illicit purpose and effect and crediting Respondents' contrary, self-serving assertion that they were simply

seeking to avert an Establishment Clause violation, the panel's decision creates a bright line rule that essentially undermines all claims advanced under a hostility toward religion theory. Permitting the panel's decision to stand would pave the road for removing all religious imagery or references from official recognition because they represent religion. Banned from public use would be the eye in the Great Seal of the United States (the eye of God in a pyramid representing the Christian Trinity), "In God We Trust" on our coinage, religious stamps the U.S. Postal Service issues at Christmas and Easter, the many white crosses marking the grave sites of our Nation's fallen veterans buried at National cemeteries, the numerous war memorials containing crosses, and even the names of our cities, including Los Angeles, San Francisco, and Corpus Christi, and all official signs and symbols on which these names appear. The pernicious effect of the panel's decision is clear. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (concurring opinion) (noting that an "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious").

In this case, by removing a long-standing and historically significant religious image from an official seal *because* it is a symbol of Christianity, Respondents have conveyed an impermissible message of hostility toward, and disapproval of, religion. For nearly five decades, the small cross on the LA County Seal stood as the official recognition of the influence of the church and the missions of California. In June 2004, however, this small cross became the target of

an official government policy that singled it out for removal *because it is Christian*.

Throughout its decisions, this Court has consistently described the Establishment Clause as forbidding not only state action motivated by a desire to promote or "advance" religion, *see, e.g., County of Allegheny v. ACLU,* 492 U.S. 573, 592 (1989), but also actions that tend to "disapprove," "inhibit," or evince "hostility" toward religion. *See Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) ("disapprove"); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973) ("inhibi[t]"); *Lynch,* 465 U.S. at 673 ("hostility"). Our Constitution prohibits government action that "foster[s] a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 846 (1995) (emphasis added); *see Lynch*, 465 U.S. at 668, 673 (stating that the Constitution "forbids hostility toward any" religion); *see also Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532 (stating that the Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general").

A state-sponsored message of disapproval of Christianity and its symbols, as evidenced by Respondents' policy, sends a message to Petitioner and other Christians that their religion is disfavored in the community. *See County of Allegheny,* 492 U.S. at 597. The First Amendment mandates neutrality toward religion and forbids hostility aimed at a particular faith. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508

U.S. at 520 (striking down a law that targeted a particular religious practice).

More recently, in *Van Orden v. Perry*, 545 U.S. 677 (2005), a case in which a plurality of justices upheld the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Breyer, in his concurring opinion, stated,

> [The removal of the religious symbol], based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.

Id. at 704.

While the language from these cases appears to support a "hostility toward religion" claim, the practical reality is that such claims are given little traction by the lower courts, as this and other cases demonstrate.[3] *See, e.g., American Family Ass'n v. City*

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[3] The Fifth Circuit has at least acknowledged that removing Christian symbols, such as a cross, from all displays "evinces not neutrality, but instead hostility, to religion." *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (holding that the

& County of San Francisco, 277 F.3d 1114, 1124 (9th Cir. 2002) (holding that San Francisco's resolution condemning a religious organization's advertisement opposing homosexuality did not violate the Establishment Clause); *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion," but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (upholding a government display of an anti-Catholic statue against an Establishment Clause challenge). At a minimum, there is much confusion in the lower federal courts that only this Court can clarify. *See* App. 23a ("We have noted that because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group, we have little guidance concerning what constitutes a primary effect of inhibiting religion.") (internal quotations and citation omitted).

As the case law would seem to suggest, singling out the small cross on the LA County Seal for disfavored treatment and removal because it is a symbol associated with Christianity violates the Establishment Clause mandate that government in

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inclusion of a Christian cross in the city insignia did not violate the Establishment Clause); *see also ACLU v. Mercer County*, 432 F.3d 624, 638 (6th Cir. 2005) (upholding the public display of the Ten Commandments and observing that the "repeated reference to 'the separation of church and state'" is an "extra-constitutional construct [that] has grown tiresome").

our democracy must remain neutral and may not take action that exhibits hostility toward a particular religion.

In the final analysis, the panel's decision essentially eviscerates this plethora of case law prohibiting government disapproval of or hostility toward religion by allowing such claims to be dismissed at the pleading stage based on nothing more than Respondents' bald, self-serving assertions. This decision must be reviewed and reversed, allowing, at a minimum, Petitioner to develop and present a full record supporting his claims.

III. THIS COURT SHOULD REVERSE AND REMAND BECAUSE THE PANEL BELOW DID NOT APPLY THE PROPER STANDARD UNDER FED. R. CIV. P. 12(b)(6) WHEN IT DISMISSED PETITIONER'S COMPLAINT FOR FAILURE TO STATE A CLAIM.

The error of the panel's decision is compounded by the fact that the case was dismissed at the pleading stage pursuant to a motion brought under Fed. R. Civ. P. 12(b)(6).

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. *See* Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.

While the long-standing and often quoted "no set of facts" proposition set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) was abrogated by this Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1969 (2007), this recent decision did not change the fundamental Rule 12(b)(6) standard that is applicable in this case. For example, in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), a cased decided after *Bell Atlantic Corp.*, this Court reversed a dismissal under Rule 12(b)(6), noting that it was error for the appellate court to conclude that the allegations in question were too "conclusory" for pleading purposes. The Court reemphasized the liberal Rule 8 pleading standard, stating that "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Id.* at 2200 (quoting *Bell Atlantic Corp.*, 127 S.Ct. 1964 (quoting *Conley v. Gibson*, 355 U.S. at 47)). This is the applicable standard that the panel failed to apply in this case.

It is well established that when reviewing the motion to dismiss, the panel was required to read the complaint in the light most favorable to Petitioner and accept as true all material allegations in the complaint, as well as reasonable inferences drawn from them. *See Erickson,* 127 S.Ct. at 2200 ("[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint."). Here, the panel failed to apply this standard by dismissing Petitioner's allegations and crediting Respondents' self-serving assertions to the contrary.

In its decision, the panel appeared to acknowledge that a "hostility toward religion" claim is viable under the Establishment Clause, thus acknowledging that Petitioner had advanced a cognizable legal theory. In fact, the panel stated, "If we assume for the moment that the revised seal did, in fact, convey an anti-Christian message, then it is understandable that Vasquez would feel aggrieved by that message. He should, accordingly, be able to seek a legal remedy.... In short, Vasquez has alleged a sufficiently concrete injury arising out of his direct contact with the purportedly offensive anti-religious symbol at issue in this case." App. 12a-13a. Despite this nod to the legitimacy of Petitioner's claim, the panel ultimately ignored its own findings and dismissed the complaint at the pleading stage.[4]

The panel also improperly weighed evidence contrary to the Rule 12(b)(6) standard. In its decision, the panel stated, "Vasquez claims that [Respondents'] purpose in removing the cross from the seal was 'anti-Christian' and 'motivated by hostility toward Christianity,'" App. 21a, (which, as noted previously and discussed further below, advances a cause of action under the Establishment Clause). However, in contradiction to Petitioner's claims, the panel "accepted [Respondents'] explanation and concluded that '[i]n the instant case, it is more plausible the

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[4] Interestingly, the panel did not dismiss Petitioner's complaint on standing grounds—apparently concerned that such precedent would upset future cases seeking to challenge and remove religious symbols—instead preferring to make the hostility toward religion claim a "non-claim."

County was seeking to avoid the expense associated with defending a threatened lawsuit over an alleged Establishment Clause violation in making its decision to remove the cross from the seal.'"[5] App. 21a. By weighing competing inferences drawn from the factual allegations in the pleadings, accepting Respondents' contrary evidence, and dismissing the complaint, the panel disregarded the standard governing motions to dismiss.

Moreover, the panel compounded its error by ignoring Petitioner's claim that Respondents' alleged purpose was a "sham" because Respondents were working with the ACLU to essentially stage such an occurrence. As alleged in the complaint, "[Respondents'] policy, practice, and/or custom to remove the cross from the LA County Seal was improperly influenced and continues to be improperly influenced by the American Civil Liberties Union, an organization that has a reputation for seeking to remove Christianity from the public square. While [Respondents] are cooperating and conferring with representatives from the American Civil Liberties Union regarding the removal of the cross, [Respondents] have refused to place this issue before

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[5] This evidentiary finding also contradicts Petitioner's allegation that removing the cross has cost Respondents, and therefore the taxpayers, "thousands of municipal and/or state funds and tax dollars." App. 59a; *see generally* App. 8a-9a. Indeed, Petitioner contends that discovery will show that this figure is much higher. Thus, "avoid[ing] expense" was hardly Respondents' motive or purpose for removing the cross.

the citizens of LA County for a vote, despite requests to do so."[6] App. 58a; *see also* App. 6a.

Indeed, the panel's truncated approach to the "purpose" inquiry is contrary to this Court's precedent. In *McCreary County v. ACLU*, 545 U.S. 844 (2005), this Court harshly criticized such an approach, stating, "The Counties would read the cases as if the purpose enquiry were so naïve that any transparent claim to secularity would satisfy it, and they would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance

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[6] Respondents' sham purpose is further evidenced by the fact that no reasonable person would conclude that the tiny cross that had been a part of the LA County seal since 1957 violates the Establishment Clause. *See Van Orden*, 545 U.S. at 677 (upholding the 40-year display of the Ten Commandments on the grounds of the Texas State Capitol).

Moreover, Respondents' reliance on the ACLU in this matter was unreasonable. For example, in *ACLU v. Mercer County,* 432 F.3d 624 (6th Cir. 2005) (upholding the public display of the Ten Commandments), the Sixth Circuit stated, "Our concern is that of a reasonable person. And the ACLU, an organization whose mission is 'to ensure that . . . the government [is kept] out of the religion business,' does not embody the reasonable person." *Id.* at 638 (quoting ACLU website).

The Sixth Circuit stated further:

> [T]he ACLU makes repeated reference to "the separation of church and state." This extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion.

Id. at 638-39 (citations omitted).

of current circumstances." *Id.* at 863-864. As the case law demonstrates, courts should scrutinize the government's actual purpose based on a well-developed record and not merely accept the self-serving statements of the government. *See, e.g., Edwards,* 482 U.S. at 578; *McCreary County,* 545 U.S. at 862 ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute or comparable official act.") (internal quotations and citation omitted). Thus, the panel's "purpose" analysis, in light of the Rule 12(b)(6) standard, was error as a matter of law.

The panel's approach to analyzing the "effects" of Respondents' action fares no better. As this Court explained, when evaluating the effect of government action under the Establishment Clause, the court must ascertain whether the challenged action is "sufficiently likely to be perceived" as a disapproval of the Petitioner's religion. *County of Allegheny,* 492 U.S. at 597 (citations omitted) (emphasis added); *see also Lynch,* 465 U.S. at 690 (O'Connor J., concurring) ("The effect prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."). This inquiry is from the perspective of an informed reasonable observer. *See County of Allegheny,* 492 U.S. at 631 (concurring opinion) (stating that the "endorsement test" is "highly context specific").

Furthermore, "the Establishment Clause forbids a State to hide behind the application of formally neutral

criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307 n.21 (internal quotations and citations omitted).

In its decision, the panel disregarded Petitioner's allegations based on its dubious inference that "[Respondents'] removal of the cross is more reasonably viewed as an effort to restore their neutrality and to ensure their continued compliance with the Establishment Clause," seeking to prove the assertion by claiming that this is "demonstrated by the fact that [Respondents] removed the cross only after the presence of crosses on other municipal seals had been held to be unconstitutional" and citing several cases as support. App. 25a. What is remarkable about the panel's assertion—in addition to being contrary to the allegations in the complaint—is the fact that the latest case cited by the panel was decided in 1995—*nine years prior to Respondents' removal of the cross in this case*. To conclude that Respondents' 2004 decision to remove the cross was made as a result of cases decided in other circuits in 1995 and prior is, to put it kindly, a stretch. *Cf. Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993) ("We do not hold that any depiction of a cross on an official insignia in California violates the [California Constitution].").

In the final analysis, the panel essentially allowed Respondents to rebut Petitioner's *prima facie* case of hostility toward religion based on contrary factual assertions and inferences the panel drew from a record that does not yet fully exist. The panel then further failed to recognize that rebutting Petitioner's assertions is not even the end of the inquiry—Petitioner should be allowed to demonstrate

that Respondents' rebuttal argument is mere pretext masking an illicit purpose, as alleged in the complaint.

IV. THE COURT'S CURRENT ESTABLISHMENT CLAUSE JURISPRUDENCE IS IN DISARRAY AND LEADS TO INCONSISTENT RESULTS THAT PROMOTE HOSTILITY TOWARD RELIGION.

The Court's modern Establishment Clause jurisprudence is in "hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring in the judgment), and in need of "[s]ubstantial revision," *County of Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in part and dissenting in part); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 n.1 (2004) (Thomas, J., concurring in the judgment) ("Our jurisprudential confusion has led to results that can only be described as silly."); *Edwards*, 482 U.S. at 639 (Scalia, J., dissenting) (criticizing the Court's "embarrassing Establishment Clause jurisprudence"); *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) ("I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.").

Inconsistent results—results which tend to promote hostility toward religion—in the inferior federal courts can be directly attributed to the insufficient and inconsistent guidance given to them by this Court. *See, e.g., Bauchman v. West High Sch.*, 132 F.3d 542, 551 (10th Cir. 1997) ("To the extent the Supreme Court has attempted to prescribe a general analytic framework within which to evaluate Establishment Clause claims, its efforts have proven ineffective."); *ACLU v. Schundler*, 168 F.3d 92, 113 (3rd Cir. 1999) (dissent) ("Until the Supreme Court decides a case in which a majority opinion of the Court utilizes a clear test to analyze a religious display, we are left with fact-specific inquiries that focus on the size, shape, and inferential message delivered by displays with religious elements, leaving almost any display that has a religious symbol in it open to challenge and any such display that has secular elements, no matter how trivial, open to judicial approval."); *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 166 n.7 (5th Cir. 1993) ("We have eschewed the tripartite *Lemon* analysis in favor of a more case-bound approach because we believe that a fact-sensitive application of existing precedents is more manageable and rewarding than an attempt to reconcile the Supreme Court's confusing and confused Establishment Clause jurisprudence.").

This case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence in the context of reviewing for the first time a case involving hostility toward religion. This Court should grant review of this case in order to provide needed guidance for the lower courts and to develop a legal framework that stems the tide of cases disfavoring religious symbols, particularly those symbols that have long

been a part of the history and traditions of the many cities and towns across this Nation.

CONCLUSION

While it appears that the panel's decision conflicts with several decisions from this Court so that consideration is necessary to secure and maintain uniformity of decisions on an important issue of federal law, the crux of the problem is that this Court's Establishment Clause jurisprudence is in disarray and in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the present Establishment Clause framework, which tends to be hostile toward religion, in favor of a workable standard that is not only capable of consistent application, but that is consistent with our Nation's religious history.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-56973

[Filed July 5, 2007]

ERNESTO R. VASQUEZ,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; DON KNABE, in his official capacity as a Supervisor, LA County; GLORIA MOLINA, in her official capacity as a Supervisor, LA County; YVONNE BRAITHWAITE BURKE, in her official capacity as a Supervisor, LA County; ZEV YAROSLAVSKY, in his official capacity as a Supervisor, LA County; and MICHAEL D. ANTONOVICH, in his official capacity as a Supervisor, LA County,
Defendants-Appellees.

ORDER

Before: PREGERSON, GOULD, and CLIFTON, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc, filed May 29, 2007, are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04-56973

[Filed May 15, 2007]

ERNESTO R. VASQUEZ,
Plaintiff-Appellant,

v.

LOS ANGELES ("LA") COUNTY; DON KNABE, in his official capacity as a Supervisor, LA County; GLORIA MOLINA, in her official capacity as a Supervisor, LA County; YVONNE B. BURKE, in her official capacity as a Supervisor, LA County; ZEV YAROSLAVSKY, in his official capacity as a Supervisor, LA County; and MICHAEL D. ANTONOVICH, in his official capacity as a Supervisor, LA County,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California.
D.C. No. CV-04-04010-SJO.
S. James Otero, District Judge, Presiding.

Before: Harry Pregerson, Ronald M. Gould, and Richard R. Clifton, Circuit Judges. Opinion by Judge Clifton.

OPINION

CLIFTON, Circuit Judge:

Plaintiff-Appellant Ernesto R. Vasquez appeals the district court's dismissal of his 42 U.S.C. § 1983 action for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Vasquez alleges that Defendants, the County of Los Angeles ("LA County") and the members of the LA County Board of Supervisors, violated the Establishment Clause of the First Amendment by removing the image of a cross from the county's official seal. Specifically, Vasquez alleges that Defendants' removal of the cross from the seal conveyed a state-sponsored message of hostility toward Christians. Because we conclude that Defendants did not violate the Establishment Clause, we affirm the district court's order dismissing Vasquez's complaint with prejudice.

I. BACKGROUND

According to Vasquez's briefs and the record, the version of the LA County Seal that included the image of the cross was first adopted on January 2, 1957, and contained "symbols of historical and cultural

significance."[1] In addition to the cross, which represented the "influence of the church and the missions of California," the seal also depicted the Roman Goddess Pomona,[2] engineering instruments, the Spanish galleon San Salvador, a tuna, a cow, the Hollywood Bowl, two stars (representing the county's motion picture and television industries), and oil derricks. A black and white image of the 1957 seal is attached as Appendix A to this opinion.

In 2004, Defendants revised the seal. First, Defendants removed the cross from the seal and substituted the image of Mission San Gabriel, the first mission established in the county.[3] Second, Defendants replaced the image of Pomona with that of a Native American woman holding a basket. Third, Defendants deleted the image of the oil derricks altogether. A black and white image of the 2004 seal is attached as Appendix B to this opinion.

According to Defendants, their decision to remove the cross from the seal was motivated by a desire to "avoid a potential Establishment Clause violation . . .

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[1] A prior version of the seal, in effect from 1887 to 1957, featured a single image: a cluster of grapes nestled in leaves. *See* http://lacounty.info/grapeseal.pdf (last visited Mar. 6, 2007).

[2] According to Defendants' official website, Pomona is the "goddess of gardens and fruit trees," and her presence on the seal represented the role of agriculture in the county.

[3] Vasquez disputes Defendants' characterization of the substitute symbol as a Christian mission. We address this argument in footnote 7 of this opinion.

and [to] affirm [the county's] neutrality." Plaintiff Vasquez contends, however, that Defendants' decision to remove the cross was motivated by their disapproval of, and hostility towards, the Christian religion. He further alleges that Defendants' decision to remove the cross was improperly influenced by the American Civil Liberties Union, which had threatened to sue Defendants over the presence of the cross on the seal as an impermissible preference for Christianity.

Vasquez is a resident and employee of LA County, and he identifies himself as a "devout Christian." On June 4, 2004, Vasquez filed this action against LA County and the members of the LA County Board of Supervisors, seeking relief under the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. Defendants promptly filed a Rule 12(b)(6) motion to dismiss Vasquez's complaint for failure to state a claim for which relief can be granted. Before the district court ruled on Defendants' motion, Vasquez filed a First Amended Complaint. In the amended complaint, Vasquez alleged that Defendants' act in "singling out the cross for removal from the LA County Seal" conveyed a state-sponsored message of hostility towards Christians and sent a clear message to Christians that they were outsiders, not full members of the political community. Vasquez claimed that he was injured by Defendants' conduct because he had "daily contact" with the revised seal and was forced to "alter his behavior to avoid this direct injury." For relief, Vasquez requested that the district court: (1) enjoin Defendants' removal of the cross from the seal; (2) issue a declaratory judgment holding Defendants' removal of the cross from the seal to be

unconstitutional; and (3) uphold the constitutionality of the 1957 version of the seal containing the cross. Defendants responded with a second Rule 12(b)(6) motion.

The district court granted Defendants' motion and dismissed Vasquez's complaint without leave to amend on October 19, 2004. According to the district court, Vasquez's complaint failed to state a claim for which relief can be granted because: (1) Vasquez did not have standing to bring the Establishment Clause challenge; (2) Defendants' substitution of the cross with the mission rendered Vasquez's Establishment Clause challenge moot; and (3) the substance of Vasquez's Establishment Clause challenge lacked merit.

Vasquez timely appealed the district court's order of dismissal.

II. DISCUSSION

We review *de novo* the district court's dismissal of a complaint for failure to state a claim under Rule 12(b)(6). *Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001). In reviewing such a motion, we accept all material allegations of fact as true and construe the complaint in a light most favorable to the non-moving party. We have consistently emphasized, however, that "conclusory allegations of law and unwarranted inferences" will not defeat an otherwise proper motion to dismiss. *See Schmier v. United States Court of Appeals*, 279 F.3d 817, 820 (9th Cir. 2002) (internal citation and quotation marks omitted). Dismissal for failure to state a claim is appropriate only "if it appears beyond doubt that the [non-moving

party] can prove no set of facts in support of his claim which would entitle him to relief." *Zimmerman*, 255 F.3d at 737 (internal citation and quotation marks omitted).

A. Standing

We begin our review with the district court's holding that Vasquez lacked standing to bring this Establishment Clause challenge. Standing is a question of law and we review *de novo*. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). A party has standing if: (1) he suffers an "injury in fact"; (2) the injury is "fairly traceable" to the challenged conduct; and (3) the injury is likely to be redressed by a favorable judicial decision. *Buono v. Norton*, 371 F.3d 543, 546 (9th Cir. 2004); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Vasquez asserts two bases for standing. First, he claims he was forced to have daily contact with the revised seal, presumably because he was a resident and employee of LA County. The injury resulting from such contact, Vasquez argues, is sufficiently "concrete and particularized" to confer Article III standing.[4] *See Lujan*, 504 U.S. at 560; *Bernhardt*, 279 F.3d at 868-69. Alternatively, Vasquez asserts standing as a county

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[4] Although Vasquez also claimed to have affirmatively "alter[ed] his behavior" to avoid contact with the revised seal, the district court disregarded this conclusory allegation for lack of specificity. Because we conclude that Vasquez would have had standing even in the absence of any altered behavior, we do not address the finding of the district court.

taxpayer. We hold that Vasquez has standing because he has alleged a legally cognizable injury arising out of his frequent regular contact with the revised county seal. Consequently, we do not reach the merits of Vasquez's taxpayer standing argument.

Whether frequent regular contact with an allegedly offensive religious symbol -- or, in this case, an allegedly offensive *anti*-religious symbol -- can give rise to a legally cognizable injury is an open question in this circuit. In prior cases, we have held plaintiffs' affirmative avoidance of areas where such symbols are located to be sufficient to confer standing. For example, in *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), a plaintiff who "regularly visited" the Mojave National Preserve sought to obtain an injunction for the removal of a cross located upon a tract of federally owned land in the Preserve. *Id.* at 544, 546. He claimed that he had standing because he was "deeply offended" by the public display of the cross on government property and, as a result, tended to avoid the area where the cross was located. *See id.* at 546-47. We held that defendant's allegedly unconstitutional conduct had impaired plaintiff's ability to "freely" and "unreservedly use public land," and that this impairment constituted an injury in fact sufficient to confer Article III standing. *See id.* at 547-48; *see also Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 619 n.2 (9th Cir. 1996) (plaintiffs established injury in fact when "they alleged that the cross [on public land] prevented them from freely using" the public park at issue); *Ellis v. City of La Mesa*, 990 F.2d 1518, 1523 (9th Cir. 1993), *cert. denied sub nom., County of San Diego v. Murphy*, 512 U.S. 1220 (1994) (plaintiffs established injury in fact when

they alleged they were not "able to freely use the public areas" due to the presence of a cross on public land); *Kreisner v. City of San Diego*, 1 F.3d 775, 778 n.1 (9th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994) (accord); *Hewitt v. Joyner*, 940 F.2d 1561, 1564-65 (9th Cir. 1991) (accord). In none of our cases, however, have we held affirmative avoidance to be a necessary component of Article III's standing requirement, and we decline to do so today.

It is useful to understand the purpose of the standing doctrine and, in particular, the element of the doctrine that requires a plaintiff to personally suffer some actual or threatened harm as a result of defendant's putatively illegal conduct. *See Heckler v. Mathews*, 465 U.S. 728, 738 (1984). At its core, the standing doctrine is aimed at "improv[ing] judicial decision-making by ensuring that there is a specific controversy before the court and that there is an advocate with a sufficient personal concern to effectively litigate the matter." ERWIN CHEMERINSKY, FEDERAL JURISDICTION 58 (4th ed. 2003). As the Supreme Court emphasized in *Baker v. Carr*, 369 U.S. 186 (1962), the "gist of the question of standing" is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 204; *see also Scott v. Rosenberg*, 702 F.2d 1263, 1267 (9th Cir. 1983).

The concept of a "concrete" injury is particularly elusive in the Establishment Clause context. *See Suhre v. Haywood County*, 131 F.3d 1083, 1085 (4th Cir.

1997) (citing *Murray v. City of Austin*, 947 F.2d 147, 151 (5th Cir. 1991)). This is because the Establishment Clause is primarily aimed at protecting non-economic interests of a spiritual, as opposed to a physical or pecuniary, nature. *Suhre*, 131 F.3d at 1086 (noting that "the spiritual, value-laden beliefs of the plaintiffs are often most directly affected by an alleged establishment of religion") (citing *ACLU v. Rabun County*, 698 F.2d 1098, 1102 (11th Cir. 1983)) (internal quotation marks omitted). As the Fourth Circuit noted in *Suhre*, the injury that gives standing to plaintiffs in the Establishment Clause context is the injury "caused by unwelcome direct contact with a religious display that appears to be endorsed by the state." *Id.*

The Supreme Court recognized the spiritual interests embodied in the Establishment Clause in *School District of Abington v. Schempp*, 374 U.S. 203 (1963). In that case, public school students and their parents challenged the school district's practice of opening each day with Bible reading and voluntary prayer. The Supreme Court held that those plaintiffs had standing to sue, even though the students did not quit school in response to the defendant's religious activities. According to the Court, plaintiffs had standing because they were "directly affected by the laws and practices against which their complaints [were] directed," *id.* at 224 n.9, and therefore, had "*a spiritual stake* in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause." *Ass'n. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (interpreting *Schempp*, 374 U.S. 203 (1963)) (emphasis added); *see also Suhre*, 131 F.3d at 1086 (accord).

In certain cases, a plaintiff's contact with an allegedly offensive religious or anti-religious symbol will remain too tenuous, indirect, or abstract to give rise to Article III standing. This is necessarily so, lest this court be converted into "a vehicle for the vindication of the value interests of concerned bystanders," *United States v. SCRAP*, 412 U.S. 669, 687 (1973), or worse yet, a "judicial version[] of college debating forums." *Valley Forge Christian College v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). We do not believe, however, that this is such a case. Vasquez has alleged more than "a mere abstract objection" to Defendants' removal of the cross from the county seal. *See Suhre*, 131 F.3d at 1086. To the contrary, he has held himself out as a member of the community where the seal is located, as someone forced into frequent regular contact with the seal, and perhaps most importantly, as someone "directly affected" by his "unwelcome direct contact" with the seal. If we assume for the moment that the revised seal did, in fact, convey an anti-Christian message, then it is understandable that Vasquez would feel aggrieved by that message. He should, accordingly, be able to seek a legal remedy. *See Schempp*, 374 U.S. at 224 n.9 (holding that plaintiffs had standing because they were "directly affected by the laws and practices against which their complaints [were] directed"); *Suhre*, 131 F.3d at 1087 ("Plaintiffs who 'are part of the community where challenged religious symbolism is located and are directly affronted by the presence of this symbolism' certainly 'have more than an abstract interest in seeing that the government observes the Constitution.'") (quoting *Saladin v. City of Milledgeville*, 812 F.2d 687, 693 (11th Cir. 1987)) (internal alterations omitted). In

short, Vasquez has alleged a sufficiently concrete injury arising out of his direct contact with the purportedly offensive anti-religious symbol at issue in this case.

Defendants suggest that a standing rule that does not always require plaintiffs to show affirmative avoidance of the allegedly offensive religious (or anti-religious) symbol would be in tension with the Supreme Court's decision in *Valley Forge*. In that case, a nonprofit organization headquartered in Washington, D.C. and four of the organization's employees challenged a conveyance of land from the government to a religious institution in Pennsylvania, upon learning of the conveyance through a press release. The Court held that those plaintiffs lacked standing to sue:

> [Plaintiffs] complain of a transfer of property located in Chester County, Pa. The named plaintiffs reside in Maryland and Virginia; their organizational headquarters are located in Washington, D.C. They learned of the transfer through a news release. Their claim that the Government has violated the Establishment Clause does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court.

Valley Forge, 454 U.S. at 486-87.

We view *Valley Forge* to be distinguishable from this case. Unlike plaintiffs in *Valley Forge*, who were physically removed from defendant's conduct, Vasquez

is a member of the community where the allegedly offending symbol was located, and his contact with the symbol was frequent and regular, not sporadic and remote. In fact, if we accept all of Vasquez's material factual allegations to be true, which we do at this stage, we must also accept the factual premise that the offending symbol "will be displayed on county buildings, vehicles, flags, stationary, forms, commendations, uniforms, and elsewhere through LA County," thereby forcing Vasquez into unwelcome "daily contact and exposure" of the most pervasive kind. These facts and allegations make Vasquez's status fundamentally different from that of plaintiffs in *Valley Forge*. *See Suhre*, 131 F.3d at 1087 (noting that "where there is a personal connection between the plaintiff and the challenged display in his or her home community, standing is more likely to lie").

In addition, we note that a standing rule requiring plaintiffs to show affirmative avoidance would impose too onerous a burden upon those seeking to challenge governmental action under the Establishment Clause. Such a requirement would effectively force individuals to quit their jobs or forgo school attendance, solely for the purpose of obtaining standing to sue. *See id.* at 1089. As the Fourth Circuit pointed out in *Suhre*, an avoidance requirement for standing would "[b]ring[] . . . Establishment Clause plaintiffs to the verge of civil disobedience [and] would go beyond what any court has heretofore decreed." *Id.* at 1088-89. We agree with the Fourth Circuit and, likewise, decline to impose such a heavy burden upon those seeking to vindicate their spiritual rights against allegedly unconstitutional governmental conduct under the Establishment Clause.

We note that the majority of other circuits that have considered the issue have held spiritual harm resulting from one's direct contact with an offensive religious (or anti-religious) symbol to be a sufficient basis to confer Article III standing. *See Suhre*, 131 F.3d at 1088 (noting that a majority of circuits have held "that neither Supreme Court precedent nor Article III imposes . . . a change-in-behavior requirement"). For example, in *Suhre*, a county resident sued Haywood County, North Carolina, seeking removal of a Ten Commandments display from the county courtroom. Plaintiff alleged he was "offended" and "filled with revulsion" every time he came into contact with the display, which was often because he was a "contentious character" who had prosecuted no less than five civil suits against his neighbors and had twice been convicted for misdemeanor telephone harassment. *Id.* at 1085. Plaintiff, however, was unable to allege that the display caused him to alter his behavior in any way. *Id.* The Fourth Circuit nevertheless held him to have standing, and in so doing, rejected the notion that legally cognizable injury could arise only when a plaintiff alters his behavior or curtails his activities in response to an offensive religious symbol. *See id.* at 1085, 1088.

Other circuits are in accord. In *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987), the Eleventh Circuit concluded that city residents' forced "direct contact with the offensive [city seal]" constituted an injury in fact sufficient to confer Article III standing. *Id.* at 692-93. In *Foremaster v. City of St. George*, 882 F.2d 1485 (10th Cir. 1989), *cert. denied*, 495 U.S. 910 (1990), the Tenth Circuit considered the

claim of an individual who lived outside the city but had "frequent and close connection" within, and held that his "allegations of direct, personal contact [with the offending city logo] suffice[d] as non-economic injury" and gave rise to standing. *Id.* at 1490-91. In *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992), the Fifth Circuit held that a resident had standing to challenge the city seal because he "live[d] and work[ed] in [the City], receiv[ed] many items of correspondence from the City, . . . [and] personally confront[ed] the insignia in many locations around the City." *Id.* at 150. Finally, in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), the Second Circuit presumed that city residents had standing to sue after they claimed to "have been exposed to the menorah in the course of their daily activities." *Id.* at 1027.[5]

We join the majority of the circuits and hold that, in the Establishment Clause context, spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing. Accordingly, we conclude that

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[5] *But see Freedom From Religion Found. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988). In that case, the Seventh Circuit held that a city resident *did not* have standing to challenge the presence of a Ten Commandments display in a city park because she failed to allege behavioral modification resulting from the presence of that display. *Id.* at 1467. To the extent that the Seventh Circuit views affirmative avoidance or behavioral modification as an indispensable component of Article III's injury in fact requirement, we reject that court's approach.

Vasquez's Establishment Clause claim should not have been dismissed for lack of standing.

B. Mootness

To qualify for adjudication in a federal court, a live controversy must exist at all stages of the litigation, not simply at the time plaintiff filed the complaint.[6] *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *In re Di Giorgio*, 134 F.3d 971, 974 (9th Cir. 1998). We review *de novo* the district court's mootness determination. *Di Giorgio*, 134 F.3d at 974.

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[6] In *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), the Supreme Court defined the mootness doctrine as a "doctrine of standing in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Id.* at 397 (quoting Henry Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)) (internal quotation marks omitted).

> A case may be rendered moot by a number of different events:
>
> > For example, a case is moot if a criminal defendant dies during the appeals process or if a civil plaintiff dies where the cause of action does not survive death. Also, if the parties settle the matter, a live controversy obviously no longer exists. If a challenged law is repealed or expires, the case is moot. Essentially, any change in the facts that ends the controversy renders the case moot.
>
> ERWIN CHEMERINSKY, FEDERAL JURISDICTION 125-26 (4th ed. 2003) (internal citations omitted).

The district court dismissed Vasquez's complaint as moot after it determined that in revising the seal, Defendants simply replaced one Christian symbol (the cross) with another (the mission). According to the district court, it is unclear how Defendants' decision to "adopt a new seal displaying an image of a Christian church could possibly be viewed as hostile to Christianity." Vasquez vigorously disputes the district court's characterization of the substitute symbol as "Christian."[7]

The district court confused the doctrine of mootness with a determination of Vasquez's claim on the merits. The central issue in any Establishment Clause case is whether a governmental act impermissibly endorsed or disapproved of religion. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Here, the district court concluded -- before applying *Lemon* and "as a simple matter of fact" -- that Defendants' act in replacing the

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[7] Specifically, Vasquez challenges the district court's characterization of the substitute symbol as a "Christian" church or mission, noting the absence of a cross and arguing that there is nothing else to identify the depicted structure as "Christian." The county, on its website, describes the substitute symbol as Mission San Gabriel, which, as a matter of history, was a Christian mission. We recognize, however, that few observers of the revised seal are likely to search the county website for the mission's official description. In any event, we do not believe it is necessary for us to address the question of how the substitute symbol would likely be perceived in order to resolve this appeal. In our consideration of Vasquez's Establishment Clause challenge, set forth below, we accept Vasquez's contention and do not assume that a "reasonable observer" of the revised seal containing the mission would make the connection to Christianity inferred by the district court.

cross could not "possibly be viewed as hostile to Christianity." This is a determination not of mootness, but rather of the substance of Vasquez's Establishment Clause claim.

Had Defendants restored the old seal or inserted a cross of comparable size and style into the revised seal, the current action might have been rendered moot. Adding the image of the mission did not terminate the controversy, however, because Vasquez contends that the revised seal, including the mission, conveys a message of hostility to the Christian religion. That claim is not moot, and the district court's holding to the contrary was in error.

C. The Establishment Clause

Having determined that Vasquez has standing to bring this claim and that the claim is not moot, we move to address the substance of Vasquez's Establishment Clause challenge. Whether there has been an Establishment Clause violation is a question of law, and we review *de novo*. *Buono v. Norton*, 371 F.3d 543, 548 (9th Cir. 2004).

Notwithstanding its "checkered career," *Lemon v. Kurtzman*, 403 U.S. 602 (1971), continues to set forth the applicable constitutional standard for assessing the validity of governmental actions challenged under the Establishment Clause. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) (noting the *Lemon* test's "checkered career in the decisional law of [the Supreme Court]"); *Am. Family Ass'n., Inc. v. City & County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002), *cert. denied*, 537

U.S. 886 (2002) (applying *Lemon*). In fact, the Supreme Court recently reaffirmed the viability of the *Lemon* test in *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005) (applying the first prong of *Lemon* to invalidate defendants' public display of the Ten Commandments). Under *Lemon*, a government act is consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disapproves of religion; and (3) does not foster excessive governmental entanglement with religion. *See Lemon*, 403 U.S. at 612-13; *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994). Although *Lemon* is most frequently invoked in cases involving alleged governmental preferences to religion, the test also "accommodates the analysis of a claim brought under a hostility to religion theory." *Am. Family Ass'n.*, 277 F.3d at 1121; *see also Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994) ("The government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion.").

Vasquez's appeal comes before us on a Rule 12(b)(6) motion to dismiss. We are not, however, precluded from considering the merits of Vasquez's claim simply because that claim reaches us on a threshold motion. To the contrary, precedent from this court and others indicates that it is appropriate to test the viability of Vasquez's claim under *Lemon*, even at this early stage. *See, e.g., Am. Family Ass'n.*, 277 F.3d at 1121-22; *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1258-60 (10th Cir. 2005); *McGinley v. Houston*, 361 F.3d 1328, 1332-33 (11th Cir. 2004). We do so and

conclude that Vasquez's Establishment Clause claim is without merit. We therefore affirm the district court's order dismissing the claim with prejudice.

1. Secular Purpose

Under the first prong of *Lemon*, we consider whether the challenged government act is grounded in a secular purpose. *See Lemon*, 403 U.S. at 612. While we must "distinguish a sham secular purpose from a sincere one," we should also be "reluctant to attribute unconstitutional motives to the [government]." *Am. Family Ass'n.*, 277 F.3d at 1121; *McCreary County*, 545 U.S. at 864; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000); *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983).

Vasquez claims that Defendants' purpose in removing the cross from the seal was "anti-Christian" and "motivated by hostility toward Christianity." Defendants counter that their purpose in removing the cross was "to avoid a potential Establishment Clause violation . . . and [to] affirm [the county's] neutrality." The district court accepted Defendants' explanation and concluded that "[i]n the instant case, it is more plausible the County was seeking to avoid the expense associated with defending a threatened lawsuit over an alleged Establishment Clause violation in making its decision to remove the cross from the seal."

We agree with the district court. Governmental actions taken to avoid potential Establishment Clause violations have a valid secular purpose under *Lemon*. *See, e.g.*, *Vernon*, 27 F.3d at 1397; *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d at 1259-60; *Roberts v.*

Madigan, 921 F.2d 1047, 1054 (10th Cir. 1990); *Bishop v. Aronov*, 926 F.2d 1066, 1077-78 (11th Cir. 1991), *cert. denied sub nom., Bishop v. Delchamps*, 505 U.S. 1218 (1992). In this respect, our decision in *Vernon v. City of Los Angeles* controls. In that case, an officer of the Los Angeles Police Department sued the city after the city launched an investigation into his religious views. Plaintiff claimed the city acted for an improper purpose. We rejected plaintiff's argument after concluding that the city's primary purpose in conducting the investigation was to determine whether plaintiff's on-duty job performance had violated the Establishment Clause. *See Vernon*, 27 F.3d at 1397. We said in *Vernon* that "[i]t is well-established that governmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose." *Id.* (internal citation omitted). The same is true in Vasquez's case.[8]

Because Defendants' removal of the cross from the LA County Seal was motivated by a legitimate secular purpose -- namely, the purpose of avoiding a potential Establishment Clause violation -- we hold that the district court did not err in concluding that Defendants satisfied the first prong of the *Lemon* test.

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[8] Indeed, as *McGinley v. Houston*, 282 F. Supp. 2d 1304 (M.D. Ala. 2003), *aff'd*, 361 F.3d 1328 (11th Cir. 2004), points out, Establishment Clause jurisprudence would be unworkable if it were any other way: "For this court . . . to hold that the removal of . . . objects to cure an Establishment Clause violation would itself violate the Establishment Clause would . . . result in an inability to cure an Establishment Clause violation and thus totally eviscerate the [E]stablishment [C]lause." *Id.* at 1307 (internal citation and quotation marks omitted).

2. Secular Effect

The second prong of *Lemon* bars governmental action that has the "principal or primary effect" of advancing or disapproving of religion. *See Lemon*, 403 U.S. at 612; *Am. Family Ass'n.*, 277 F.3d at 1122. Governmental action has the primary effect of advancing or disapproving of religion if it is "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378 (9th Cir. 1994). We analyze the effect prong of *Lemon* from the point of view of a reasonable observer who is "informed . . . [and] familiar with the history of the government practice at issue." *See id.*

We have noted that "because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group, we have little guidance concerning what constitutes a primary effect of inhibiting religion." *Am. Family Ass'n.*, 277 F.3d at 1122. The most instructive cases in our circuit are *Vernon* and *American Family Association*, which addressed alleged violations of the Establishment Clause in a hostility to religion context.

In *Vernon*, plaintiff, a police officer who identified himself as a member of the Grace Community Church, allegedly consulted with religious elders on matters of police policy, thwarted the progress of gay and female police officers, pressured other officers to attend religious meetings, and refused to arrest anti-abortion

demonstrators. *See* 27 F.3d at 1388-89. When the city launched an investigation into his religious beliefs, plaintiff sued, claiming that the city's pursuit of the investigation had the primary effect of inhibiting or disapproving of his religion. *See id.* at 1390. We held that "[n]ot withstanding the fact that one may infer possible city disapproval of [plaintiff's] religious beliefs from the direction of the investigation, this cannot objectively be construed as the primary focus or effect of the investigation." *Id.* at 1398-99. To the contrary, "[t]he primary purpose of the government action was the investigation of any possible impermissible or illegal on-duty conduct of [plaintiff]." *Id.* at 1399. As such, the investigation could not "reasonably be construed to send as its *primary* message the disapproval of [plaintiff's] religious beliefs." *Id.* (emphasis in original).

Similarly, in *American Family Association*, defendants adopted a resolution condemning a series of anti-gay advertisements that plaintiff religious groups had put forth in a local newspaper. *See* 277 F.3d at 1118-20. We held that the resolution, when "read in context as a whole, [was] primarily geared toward promoting equality for gays and discouraging violence against them." *Id.* at 1122. On that basis, we concluded that "a reasonable, objective observer would view the primary effect of [the resolution] as encouraging equal rights for gays and discouraging hate crimes, and any statements from which disapproval can be inferred only incidental and ancillary." *Id.* at 1122-23 (citing *Vernon*, 27 F.3d at 1398-99).

In the context of this case, a reasonable observer who is "informed . . . [and] familiar with the history of the government practice at issue" would not view Defendants' removal of the cross from the LA County Seal as an act of hostility towards religion. *See Brown*, 27 F.3d at 1378. To the contrary, Defendants' removal of the cross is more reasonably viewed as an effort to restore their neutrality and to ensure their continued compliance with the Establishment Clause. This is demonstrated by the fact that Defendants removed the cross only after the presence of crosses on other municipal seals had been held to be unconstitutional. *See, e.g., Robinson v. City of Edmond*, 68 F.3d 1226, 1232 (10th Cir. 1995); *Harris v. City of Zion*, 927 F.2d 1401, 1413 (7th Cir. 1991); *Friedman v. Bd. of County Comm'rs*, 781 F.2d 777, 778 (10th Cir. 1985); *see also Murray v. City of Austin*, 947 F.2d 147, 163 (5th Cir. 1991) (Goldberg, J., dissenting), *cert. denied*, 505 U.S. 1219 (1992) (noting that there has been "constant . . . judicial disapproval of government use of Christian crosses . . . on municipal seals" and pointing out that "[t]he Supreme Court itself has repeatedly disapproved in dicta the governmental display of crosses"). *But see Murray*, 947 F.2d at 158 (holding that the presence of a cross on the city insignia did not violate the Establishment Clause).

We need not adjudge the constitutionality of the cross on the original county seal for purposes of this case, nor do we discount the possibility that Defendants here may have been able to distinguish their usage of the cross on the seal to achieve a contrary result. Nevertheless, we believe that a "reasonable observer" familiar with the history and controversy surrounding the use of crosses on

municipal seals would not perceive the primary effect of Defendants' action as one of hostility towards religion. Rather, it would be viewed as an effort by Defendants to comply with the Establishment Clause and to avoid unwanted future litigation.

Because a reasonable observer would not have viewed Defendants' removal of the cross from the seal as an act of hostility towards the Christian religion, or towards religion in general, we hold that the district court did not err in concluding that Defendants satisfied the second prong of the *Lemon* test.

3. Excessive Entanglement

The third prong of *Lemon* bars governmental action that fosters "excessive governmental entanglement with religion." *See Lemon,* 403 U.S. at 613. Vasquez argues that Defendants' removal of the cross from the seal caused excessive entanglement because it "tacitly created a hierarchy of religious symbols," resulted in "tremendous public outcry," and brought about great social and political divisiveness. It is true that in prior cases, we have suggested that one of the factors we examine in determining whether excessive entanglement has occurred is whether the challenged governmental action caused citizens to divide along political lines. *See Vernon*, 27 F.3d at 1401; *Cammack v. Waihee*, 932 F.2d 765, 781 (9th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992). We have consistently held, however, that political divisiveness is not an "*independent ground* for holding a government practice unconstitutional." *See, e.g., Brown*, 27 F.3d at 1383 (emphasis added); *Am. Family Ass'n.*, 277 F.3d at 1123; *Cammack*, 932 F.2d at 781. In that regard, our

decision in *American Family Association* is dispositive. In that case, we rejected plaintiffs' argument that excessive entanglement resulted solely from governmental action that "encouraged political divisiveness along religious lines." *Id.* at 1123. In so doing, we noted that if "[political divisiveness] were enough to create an Establishment Clause violation on entanglement grounds, government bodies would be at risk any time they took an action that affected potentially religious issues." *Id.* Because Vasquez did not allege anything other than social and political divisiveness, his entanglement argument must necessarily fail.

Based on our *de novo* review of the allegations set forth in Vasquez's complaint, we conclude that the district court did not err in dismissing Vasquez's Establishment Clause challenge pursuant to Rule 12(b)(6). Accordingly, we affirm the district court's order of dismissal.

D. Dismissal Without Leave to Amend

Lastly, we consider whether the district court appropriately dismissed Vasquez's complaint without leave to amend. Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment. *Schmier v. United States Court of Appeals*, 279 F.3d 817, 824 (9th Cir. 2002).

In light of our prior discussion, we are satisfied that Vasquez's complaint falls short of stating a claim under the Establishment Clause in ways that could not be overcome by any amendment. Granting Vasquez

leave to amend would have been futile, and we hold that the district court did not err in preventing such futility. *See id.* at 824 (recognizing "[f]utility of amendment" as a proper basis for dismissal without leave to amend).[9]

III. CONCLUSION

In sum, although we conclude that Vasquez's Establishment Clause claim should not have been dismissed for lack of standing or for mootness, we hold that the district court did not err in dismissing Vasquez's claim on the merits. Accordingly, we affirm the order of the district court dismissing Vasquez's Establishment Clause claim with prejudice.

AFFIRMED.

Appendix A

[SEE EXHIBIT IN ORIGINAL]

Appendix B

[SEE EXHIBIT IN ORIGINAL]

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[9] Because Vasquez failed to state a claim under the Establishment Clause, we also deny his request for leave to amend his complaint to add a claim for nominal damages. *See generally Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (holding that nominal damages are appropriate for deprivations of constitutional rights that do not result in actual injury).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 04-4010 SJO (VBKx)

[Filed October 19, 2004]

ERNESTO R. VASQUEZ,
Plaintiff,

v.

LOS ANGELES ("LA") COUNTY, *et al.*,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Defendants Los Angeles County, the LA County Board of Supervisors, Don Knabe, *et al.* (collectively "LA County" or "Defendants") are moving to dismiss Plaintiff Ernesto Vasquez' First Amended Complaint ("FAC"). Mr. Vasquez filed a Complaint against LA County on June 04, 2004. Defendants promptly filed a Motion to Dismiss. Before the court could grant that Motion, Plaintiff filed a First Amended Complaint, rendering moot Defendants' first Motion to Dismiss. On August 30, 2004, Defendants filed a Motion to

Dismiss Plaintiffs FAC.[1] Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the court finds this matter appropriate for decision without oral argument. For the reasons stated herein, Defendants' Motion to Dismiss is hereby GRANTED.

I. BACKGROUND

The gravamen of Mr. Vasquez' FAC is "he objects to Defendants' removal of the cross from the LA County Seal because this policy....conveys the impermissible state-sponsored message of disapproval and hostility toward Christianity" and allegedly sends a message that Plaintiff and other Christians are outsiders and not full members of the LA County community.[2] *(See* FAC ¶ 7.) The FAC contains only one cause of action - a claim for relief based on the Establishment Clause of the First Amendment to the United States Constitution as applied to the states under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983. *(Id.* ¶ 20.) Mr. Vasquez avers "[a]s a direct proximate result of Defendants' [conduct], Plaintiff has suffered irreparable harm, including the loss of his

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[1] Plaintiff filed an Opposition that exceeded the page limits set by this court by ten pages. Plaintiff's Opposition is not only long winded, it is also polemical and characterized by a strained interpretation of the law. *(See generally* Opp'n.) This kind of argument is not well suited to a court of law. Normally, when a party violates a court order, it faces sanctions. In the instant case, the court has opted not to issue sanctions.

[2] Supervisors Knabe and Antonovich voted against the removal of the cross.

constitutional rights." (*Id.* ¶ 21.) He seeks an injunction to prevent Defendants from removing the cross from the LA County seal; as well as attorneys fees and costs.

In his FAC, Plaintiff describes the LA County seal, adopted on March 01, 1957, as containing "symbols of historic and cultural significance." (Id. ¶ 11.) Notably, Plaintiff claims the seal, and more specifically the small cross depicted on the seal, do not convey any religious message. (*Id.*) According to the Plaintiff, the cross only represents the historic "influence of the church and the missions of California." *(Id.)* Yet Plaintiff maintains LA County is conveying a message of hostility to religious groups by removing the symbol from the seal. (*Id.* ¶¶ 11-12.) In other words, Plaintiff avers the Christian religious symbol of a cross conveys no religious message, but the removal of that symbol conveys an impermissible message of hostility toward religion.[3]

Other symbols on the original seal included: an image of the goddess Pomona[4] standing on the shore of

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[3] Defendants are assiduous in drawing this apparent *non sequitur* to the court's attention. *(See* Mot. to Dismiss P. & A., *hereinafter* "P.&A.," at 3.) Plaintiff's premise is that the cross conveys no religious message. It is not strictly logical to proceed from that premise and conclude removal of the same cross conveys an unconstitutional religious message.

[4] In Roman times, Pomona was the goddess of fruit trees. She also symbolizes abundance. While Plaintiff maintains the Christian cross conveys no religious message, Plaintiff argues the inclusion of a classical Roman goddess officially recognizes, endorses and

the Pacific Ocean with the San Gabriel Mountains in the background, engineering instruments, a depiction of the Spanish galleon San Salvador, a tuna, a cow, two stars representing the entertainment industry, images of oil derricks, and the Hollywood Bowl. (*Id.*)

The court hereby takes judicial notice of an article appearing in the Los Angeles Times on September 09, 2004, entitled "New Seal, Sans Cross, Offers Other Changes." The article includes a depiction of the old

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finds favor with polytheism. (FAC ¶18.) Plaintiff's analysis and interpretation of the inclusion of Pomona is highly strained. *See Alvarado v. City of San Jose*, 94 F.3d 1223, 1232 (9th Cir. 1996). In *Alvarado*, the Ninth Circuit made the following observation with respect to the representation of an Aztec deity in a public space:

> The reasonable observer in this case would presumably be aware that the Plumed Serpent represents an ancient Aztec deity, as publicized by the City, and that the City-sponsored dedication ceremony included a performance by a Native American Aztec dance group....None of these elements would lead the reasonable observer to infer an endorsement of religion on the part of the City.

Id. The same is true in the instant case - a reasonable observer would not view the placement of a classical deity on the County seal as an endorsement of religion. *See id.* Utilization of classical symbology is rarely, if ever, viewed as an endorsement of polytheism. Since the Renaissance, however, and especially since the Victorian era, classical symbols such as the goddess Pomona have been used by Christian artists and scholars to represent a variety of ideals, in this case abundance. Accordingly, it is not immediately clear that the presence of the goddess Pomona on the old County seal conveyed any religious message at all.

and new County seal. The new seal contains no visual or literary reference to Pomona. The goddess has been replaced by an image of a Native American Woman holding a basket. Accordingly, any objection to a depiction of the goddess Pomona is moot. Also deleted was an image of oil derricks included in the old seal.

The new seal also contains an image of a Christian mission. As a preliminary matter, it is unclear how the County's decision to adopt a new seal displaying an image of a Christian church could possibly be viewed as hostile to Christianity. In view of that fact this entire lawsuit is moot. The Christian cross has simply been replaced with another symbol representing the historical significance of the Catholic church to the County - a Christian mission. Plaintiff's entire grievance is based on the erroneous assumption that the cross would be replaced with a non-religious or "anti-Christian" symbol. (*See generally* FAC.) As a simple matter of fact, the cross has not been so replaced. Instead, the Christian cross has been supplanted with a visual representation of a Christian church. In view of this fact, this case is MOOT and must be DISMISSED.[5]

II. LEGAL STANDARD

Rule 12(b)(6) must be read in conjunction with Rule 8(a) which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." 5A

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[5] For this reason, the case is hereby dismissed with prejudice and closed. However, the case is also dismissed for the reasons stated in greater detail herein.

Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 1356 (1990). Dismissal is appropriate when it is clear no relief could be granted under any set of facts that could be proven consistent with the allegations set forth in the complaint. *See Williamson v. General Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000); *Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1101 (9th Cir 1999); *Newman v. Universal Pictures*, 813 F.2d 1519, 1521-22 (9th Cir. 1987). A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). The court must accept all material allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986); *see also Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir. 1980). The court must view all allegations in the complaint in the light most favorable to the non-movant and must accept all material allegations - as well as any reasonable inferences to be drawn from them - as true. *See Big Bear Lodging Ass'n, supra*, 182 F.3d at 1101; *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1120 (9th Cir. 2002). The court cannot grant the Motion to Dismiss "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41,45-46 (1957).

"Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc.*, 942 F.2d 1457, 1472 (9th Cir. 1991). Under the

Federal Rules of Civil Procedure 15(a), leave to amend "shall be freely given when justice so requires." "Dismissal is warranted only if it appears to a certainty that [plaintiff] would be entitled to no relief under any state of facts that could be proved." *NL Indus.*, 792 F.2d at 898. However, a court need not accept as true unreasonable inferences or conclusory legal allegations. *Western Min. Council v. Watt,* 643 F.2d 618, 624 (9th Cir.), *cert. denied,* 454 U.S. 1031 (1981). The court's discretion in deciding whether to dismiss without leave to amend "is particularly broad" when the plaintiff previously has been granted leave to amend. *Simon v. Value Behavioral Health, Inc.,* 208 F.3d 1073, 1084 (9th Cir. 2000). Leave to amend is usually denied only when there are no facts in dispute and the issue is whether there is liability as a matter of law. *See Albrecht v. Lund,* 845 F.2d 193, 195-96 (9th Cir. 1988). Repeated failure to cure deficient pleadings also provides grounds to deny leave to amend. *Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir. 1990). In the instant case, Plaintiff has already been given an opportunity to file a satisfactory Amended Complaint, but has failed to do so.

A district court can deny leave to amend "where the amendment would be futile...or where the amended complaint would be subject to dismissal." *Saul v. U.S.,* 928 F.2d 829, 843 (9th Cir. 1991) (citations omitted); *see also Steckman v. Hart Brewing, Inc.,* 143 F.3d 1293, 1298 (9th Cir. 1998); *and Miller v. Rykoff-Sexton ,Inc.,* 845 F.2d 209, 214 (9th Cir. 1988)(commenting "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense.")

Unless the court converts a Rule 12(b)(6) motion into a motion for summary judgment, the court cannot consider material outside of the complaint (*e.g.*, facts presented in briefs, affidavits, or discovery materials). *Levine v. Diamanthuset Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991). A court may however, consider exhibits submitted with the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

III. DISCUSSION

Defendants move for dismissal on the following grounds: (1) Plaintiff does not state a legally cognizable claim because the legislature granted the County the power to act on the subject matter at issue, and courts purportedly have no power to interfere with such a governmental body in the exercise of its discretionary functions; (2) Plaintiff fails to state a legally cognizable cause of action under the Establishment Clause; and (3) the individual supervisors named as Defendants should be dismissed because they are redundant defendants. *(See generally* P.&A. at pp.1-16.) Before reaching those arguments, the court must first determine whether the case is justiciable.

A. Standing

Standing is a threshold requirement in every federal case. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The doctrine of standing focuses on the party seeking to invoke federal jurisdiction rather than the issue at stake in the litigation. *Fulani v. Bentsen*, 35 F.3d 49,

51 (2d Cir. 1994). In *Warth,* the Supreme Court explained standing "is founded in concern about the proper - and properly limited role - of the courts in a democratic society." *Warth, supra,* 422 U.S. at 498. Standing includes purely prudential limitations, but "the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Over the years, the Supreme Court "established that the irreducible constitutional minimum of standing contains three elements." *Id.*

> First, the plaintiff must have suffered an "injury in fact" - an invasion of a legally protected interest which is (a) concrete and particularized,...and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'"...Second, there must be a causal connection between the injury and the conduct complained of - the injury has to be "fairly...trace[able] to the challenged action of the defendant, and not...the result [of] the independent action of some third party not before the court."...Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, supra, 504 U.S. at 561 (1992) (citations omitted). In *Bennett v. Spear,* 520 U.S. 154, 162 (1977), the Supreme Court succinctly summarized the requirements for standing: "[t]o satisfy the "case" or "controversy" requirement of Article III,...a plaintiff must...demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions

of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear,* 520 U.S. 154, 162 (1997) *(citing Lujan,* 504 U.S. at 560-61). "To have standing, the plaintiff must have suffered a 'particularized' injury, which means that 'the injury must affect the plaintiff in a personal and individual way.'" *Raines v. Byrd,* 521 U.S. 811, 819 (1997) *(citing Lujan,* 504 U.S. at 560-61).

The Supreme Court has also "stressed that the alleged injury must be legally and judicially cognizable." *Raines, supra,* 521 U.S. at 819. "This requires, among other things, that the plaintiff have suffered "an invasion of a legally protected interest which is...concrete and particularized," and that the dispute is "traditionally thought to be capable of resolution through the judicial process." *Id.* (*citing Lujan,* 504 U.S. at 560; *and Flast v. Cohen,* 392 U.S. 83, 97 (1968). Typically, a plaintiff cannot show a cognizable injury in fact by simply identifying some "psychological consequence presumably produced by observation of conduct with which one disagrees." *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 485 (1982).

There are also prudential limitations on standing. The three prudential limitations are as follows:

> (1) the plaintiff must assert his own rights and not rest his claim to relief on the legal rights or interests of third parties; (2) the plaintiff's injury, although cognizable under Article III, must not be "shared in equal measure by all or a large class of citizens" so as to represent only

> a "generalized grievance"; and (3) the plaintiff's interest must arguably fall within the zone of interests intended to be protected by the statute at issue.

MAI Sys. Corp. v. UIPS, 856 F. Supp. 538, 540 (1994)(citing *McMichael v. County of Napa,* 709 F.2d 1268, 1269 (9th Cir. 1983)); *see also Warth, supra,* 422 U.S. at 499 (commenting a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens,...does not warrant exercise of jurisdiction.") The requirements for injury and causation are constitutionally required, while the ban on third-party standing and the prohibition against federal courts deciding generalized grievances are prudential. *Warth, supra,* 422 U.S. at 500-01. In *Warth,* the Supreme Court observed "[a]s an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *Warth,* 422 U.S. at 498 (citing *Baker v. Carr,* 369 U.S. 186, 204 (1962).

In the instant case, there are two reasons why Plaintiff Vasquez has failed to meet the standing requirement. First, Plaintiff failed to allege a legally cognizable injury in fact, and that is an irreducible minimum requirement for standing in federal court. *Bennett,* 520 U.S. at 162. Second, this court is also concerned Mr. Vasquez failed to meet the requirement "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Bennett, supra,* 520 U.S. at 167.

1. Injury in Fact

In the instant case, Plaintiff objects to "Defendants' removal of the cross from the LA County Seal because this newly adopted policy....conveys the impermissible state-sponsored message of disapproval and hostility toward Christianity" and allegedly sends a message that Plaintiff and other Christians are outsiders and not full members of the LA County community. (*See* FAC ¶¶ 7, 13 & 17.) Plaintiff fails to aver any concrete or particularized harm. Reading the FAC in the light most favorable to Plaintiff, the only harm allegedly suffered by Mr. Vasquez is purely psychological. (*See id.*) Plaintiff cannot satisfy the case or controversy requirement by simply identifying some psychological harm "presumably prod uced by observation of conduct with which one disagrees." *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church & State,* 454 U.S. 464, 485 (1982). Without such a limitation, the federal courts would be an easy avenue for any person to challenge each and every act of state, local or federal government. Mere interest in a problem is not sufficient to satisfy the requirements for standing. *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972).

In *Lujan*, for example, the Supreme Court denied standing to two individuals who submitted affidavits stating they used land in the vicinity of some territory at issue in a dispute over land use because it was unclear whether those two individuals really had a concrete and personal stake in the litigation. *Lujan,* 497 U.S. at 888. In other words, the two individuals may have had an interest in adjacent land, but not the territory at issue in that dispute. *See id.* This doctrine

has also been applied to deny standing to individuals contesting the boundaries of an election district. *United States v. Hays,* 515 U.S. 737 (1995); *and Shaw v. Hunt,* 517 U.S. 899, 904-05 (1996).

Because Mr. Vasquez has not suffered "concrete and particularized harm" as those terms are defined by the Supreme Court of the United States, he does not have standing to pursue his claim. *See, e.g., Raines,* 521 U.S. at 819. The result would probably be different if Plaintiff alleged he "has been injured due to his...not being able to freely use public areas." *Ellis v. City of Law Mesa,* 990 F.2d 1518, 1523 (9th Cir. 1993)(holding that the utilization of religious symbolism by a government entity created a cognizable injury adequate to confer standing in a case where several groups complained they were unable to use a public space due to the placement of a cross in that public space.) However, Mr. Vasquez declares that he will be injured every time he is exposed to the seal, each day he goes to work.[6] (FAC ¶ 17.) In other words, Plaintiff plainly intends to follow the same path to work "each day." (*Id.*) He has not been excluded from any public area due to the County's decision to remove the cross from the County seal. (*See generally* FAC.) The alleged harm, therefore, is purely psychological. Moreover, it is not immediately clear that a reasonable person would suffer any legally cognizable injury from the County's decision to replace a picture of a cross

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[6] Plaintiff also states that he will "alter his behavior," but fails to identify any specific injury. Plaintiff has already had two chances to allege a specific cognizable harm and has failed to do so.

with a picture of a Christian mission, *de minimis non curat lex.*[7]

"The requirement that the plaintiff allege an 'injury-in-fact,' whether economic or non-economic, excludes simple indignation as a basis for Article III standing." *Harris v. Zion,* 927 F.2d 1401, 1405 (7th Cir. 1991). "That the plaintiffs may be offended by the defendants' conduct is not enough to confer standing." *Id.* An injury to a constitutional right may confer standing. For example, an allegation of subjective chill on First Amendment Rights imposed by army surveillance as in *Laird v. Tatum,* 408 U.S. 1 (1972) is enough to confer standing. But there is no constitutionally mandated right to the placement of religious symbolism on government property. In fact there are several cases holding quite the opposite.[8]

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[7] "The primary effect of a challenged practice generally is considered under the reasonable observer standard." *Brown v. Woodland Joint Unified Sch. Dist.,* 27 F.3d 1373, 1378 (9th Cir. 1994).

[8] The court makes no ruling as to whether the placement of the cross on the old County seal is violative of the Establishment Clause. That is a significantly different issue. There are cases on both sides of the issue. *See, e.g., Murray v. City of Austin, Tex.,* 947 F.2d 147 (5th Cir. 1991), *reh'g denied,* (Dec. 3, 1991); *contra Separation of Church and State Committee v. City of Eugene of Lane County, State of Or.,* 93 F.3d 617 (9th Cir. 1996). In a recent case from the Seventh Circuit, the court found the state's purpose in displaying a monument of the Ten Commandments and its placement on the grounds of the statehouse violated the Establishment Clause. *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir. 2001, *cert. denied,* 534 U.S. 1162; *see also Glassroth v. Moore,* 229 F. Supp. 2d 1290, 1301 (D. Ala. 2002). The

See, e.g., Ellis v. City of La Mesa, 990 F.2d 1518, 1528 (9th Cir. 1993); *Harris v. City of Zion,* 927 F.2d 1401, 1415 (7th Cir. 1990), and *Friedman v. Board of County Comm. of Bernalillo County,* 781 F.2d 777 (10th Cir. 1985). For the reasons stated in greater detail below, Plaintiff failed to identify a legally cognizable injury under the Establishment Clause. Moreover, Plaintiff failed to allege any physical injury or deprivation. As

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court in *O'Bannon* found the state's purpose in displaying the monument was to advance religion; and reasoned the state had not shown a historical link between the Ten Commandments and the ideals of government, *Id.* at 771-73. In the instant case, it is urged by Plaintiff that the cross is a historical reference to the significance of the Spanish missions to the culture and development of the County of Los Angeles. *(See, e.g.,* FAC ¶ 11.) That might be true. However, the alleged historical nexus does not convey a right to any one to force their local governments, through the courts, to retain the representation of a cross on the County seal.

Plaintiff suggests he has a constitutionally guaranteed right to require his local and federal government to display religious imagery on public property. (Opp'n at 9:10-23.) The Establishment Clause does not confer such a benefit on any member of any religion. In support of his argument, Plaintiff notes the federal government included religious symbology on United States currency. *(Id.)* However Plaintiff's argument misses the point. The question is not whether Congress, or in this case the County, is violating the Constitution in approving of such symbols. Rather, the question is whether Congress has the right to remove those symbols if it so chooses. This court holds no private citizen has standing to challenge a government decision to remove symbols from a public or government space unless the government also decides to simultaneously adopt imagery that is violative of the Constitution.

many courts have stated, mere indignation is not enough to confer standing. *See, e.g., Harris v. Zion,* 927 F.2d at 1405. As a result, this case cannot go forward and must be dismissed because Plaintiff lacks standing.

B. No Legally Cognizable Harm under the Establishment Clause

The First Amendment provides "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof." U.S. Const. Amend. I. As the Seventh Circuit stated in *Harris,* "it is generally accepted that the framers had two purposes in mind when they drafted the above quoted language: "to prevent the establishment of a national church, and to forbid a national preference of one Christian sect over another." *Harris, supra,* 927 F.2d at 1410 (7th Cir. 1991) (citing *American Jewish Congress v. City of Chicago,* 827 F.2d 120, 123 (7th Cir. 1987)). "In addition to the individual's complete freedom of conscience, 'the Religion Clauses also have come to stand for the principle of govern mental neutrality, meaning not only that government should not favor one religion over another, but also that government should not favor religion over nonreligion.'" *Id.* (citing *American Jewish Congress,* 827 F.2d at 124).

The First Amendment prohibits official hostility or disapproval towards religion, a particular religion or religious belief. *Am. Family Ass'n v. City & County of San Francisco,* 277 F.3d 1114, 1120-21 (9th Cir. 2002) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993)). As the Supreme

Court noted in *Epperson v. Arkansas,* "[g]overnment in our democracy, state and nation, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite." *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968). The same Court added "the First Amendment mandates governmental neutrality between religion and nonreligion." *Id.* Plaintiff pins his entire case on the theory that removal of a cross from a public space, in this case the County seal, conveys an unconstitutional message of hostility toward all Christians.[9] (FAC ¶ 11.)

> the Establishment Clause [has come] to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not

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[9] If the court were to side with Plaintiff on this point, the court could be viewed as endorsing the view that legislative bodies and courts are constitutionally barred from ordering the removal of religious symbols from public property. Such a holding would put this court at odds with decisions by higher courts. *See, e.g., Separation of Church & State Comm. v. City of Eugene,* 93 F.3d 617, 620 (9th Cir. 1996); *and Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766 (7th Cir. 2001), *cert. denied,* 534 U.S. 1162 (2002). This court, however, is bound by the decisions of higher courts and is not inclined to make new law, *stare decisis et non quieta movere.*

> involve itself too deeply in such an institution's affairs.

Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996) (citing *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590-91 (1989)).

To determine whether a government action, in this case the removal of a cross from the County seal, constitutes a practice violative of the Establishment Clause, the court must determine whether the government action is excessively entangled with religion. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971) the Supreme Court articulated a three part test for courts to use when ask to determine whether the government entanglement with religion is excessive. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion." *Lemon, supra*, 403 U.S. at 612-13.

Plaintiff insists the court apply the "endorsement test" described in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590-91 (1989). On this point the Ninth Circuit made the following observation:

> Establishment Clause principles have been "refined" into the three-part *"Lemon"* test named for the Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971). *Allegheny*, 492 U.S. at 592. "Under the *Lemon* analysis, a statute or

> practice which touches upon religion..., must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *Id.* Though much maligned by scholars and various Justices, *Lemon* has never been overruled, and the *Lemon* test is the one applied in this circuit.

Alvarado v. City of San Jose, 94 F.3d 1223, 1231 (9th Cir. 1996) (citing *Brown v. Woodland Joint Unified Sch. Dist.,* 27 F.3d 1373, 1378 (9th Cir. 1994); *and Kreisner v. San Diego,* 1 F.3d 775, 780 (9th Cir. 1993), *cert. denied,* 510 U.S. 1044, 114 S. Ct. 690, 126 L. Ed. 2d 657 (1994)).

Regarding the endorsement test, the Ninth Circuit commented: "In *Allegheny,* a majority of the Supreme Court relied on the 'endorsement' test introduced by Justice O'Connor in *Lynch v. Donnelly,* 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring)." *Id.* "This test is closely related to the effects prong of the *Lemon* test, insofar as it concerns the government's alleged promotion of religion, whether apparent or intentional." *Id.* (citing *Allegheny, supra,* 492 U.S. at 592-94). In *Alleghany,* the Supreme Court endorsed the *Lemon* test, adding "[o]ur subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Allegheny,* 492 U.S. at 592. The Supreme Court did not set a strict definition of the term "endorsement" in *Allegheny,* but observed "the prohibition against

governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 593 (quoting *Wallace v. Jaffree,* 472 U.S. at 70). The Court went on to explain:

> the term "endorsement" is closely linked to the term "promotion," *Lynch v. Donnelly,* 465 U.S. at 691 (O'Connor, J., concurring), and this Court long since has held that government "may not...promote one religion or religious theory against another or even against the militant opposite," *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968).

Id. Quoting Justice O'Connor's concurrence in *Lynch v. Donnelly,* the Court stated "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* (quoting *Lynch v. Donnelly,* 465 U.S. at 687 (O'Connor, J., concurring)).

Finally, with respect to the adoption of religious symbolism by a local government, the Court laid down the following principles: "[a] government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* at 597. The Court explained:

> [t]hese general principles are sound, and have been adopted by the Court in subsequent cases. Since *Lynch,* the Court has made clear that,

> when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

Id. (citations omitted). According to the Supreme Court in *Alleghany,* the task of this court is to ascertain whether removal of the cross, and its subsequent replacement by a representation of a Christian mission, "has the effect of endorsing or disapproving religious beliefs" when that government action and the religious symbolism is viewed within relevant physical settings. *See id.* On that point, the County's decision to remove the symbol from the seal, and replace that image with a depiction of a Christian mission, cannot reasonably be viewed as an action hostile to Christianity. It would defy common sense to hold otherwise. The constitutionality of the County's decision to place an image of a Catholic mission on the seal is not at issue in the instant case and the court expresses no opinion on that matter.

Regarding the remaining factors[10] in the *Lemon* test - (i) secular legislative purpose; and (ii) excessive government entanglement with religion - the court finds the contested action does not violate the Establishment Cause for the following reasons. First, with regard to the secular legislative purpose, Plaintiff's own FAC claims the cross does not convey any religious message. (FAC ¶¶ 11 & 14.) It is illogical to simultaneously maintain that removing the cross sends an impermissible religious message. Second, a reasonable observer would not conclude the County's decision to replace the cross with a depiction of a Catholic mission is intended to convey a message of hostility to Christians in this district. Third, Plaintiff does not make any reasonable assertion the County was motivated by hostility toward Christianity in making its decision to replace the cross with the Catholic mission. This court "must be 'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Am. Family Ass'n v. City & County of San Francisco,* 277 F.3d 1114, 1121 (9th Cir. 2002)(quoting *Kreisner v. City of San Diego,* 1 F.3d 775, 782 (9th Cir. 1993)). In the instant case, it is more plausible the County was seeking to avoid the expense associated with defending a threatened lawsuit over an alleged Establishment

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[10] As the Ninth Circuit observed in *Alvarado,* "[the endorsement] test is closely related to the effects prong of the *Lemon* test, insofar as it concerns the government's alleged promotion of religion, whether apparent or intentional." *Alvarado, supra,* 94 F.3d at 1231. The court's interpretation is the same under the second prong of the *Lemon* test - the "effects prong" - as it is under the endorsement test. Accordingly, the court will only examine the first and third prong of the *Lemon* test.

Clause violation in making its decision to remove the cross from the seal.

Finally, the court in *McGinley v. Gorman Houston*, 282 F. Supp. 2d. 1304 (M.D. Ala. 2003) turned back a challenge made by another Plaintiff relying on the same theory at issue in the instant case. In *McGinley*, the court cogently observed:

> [the Supreme] Court has made clear that the neutrality mandated by the establishment clause does not itself equate with hostility towards religion."...It does not "accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion."...To hold that the government cannot endorse religion does not "manifest a governmental hostility to religion or religious teachings...The First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

McGinley, supra, 282 F. Supp. 2d at 1308 (citations omitted).

Turning to the excessive entanglement prong of the *Lemon* test, the court "must examine the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Brown v. Woodland Joint Unified*

School Dist., 27 F.3d 1373, 1383 (9th Cir. 1994). Plaintiff fails to adequately set forth any allegations satisfying the excessive entanglement prong of the *Lemon* test. Plaintiff avers the cross only conveys historical and cultural symbolism in the instant case. Accordingly, any action taken with regard to the cross could not logically constitute excessive entanglement with religion. Moreover, there does not appear to be any benefit provided by the state to any religious, or anti-religious organization. *See id.*

Accordingly, Plaintiff fails to state a claim for which relief can be granted under the Establishment Clause. Dismissal of the case with prejudice is warranted. *See, e.g., McGinley, supra,* 282 F. Supp. 2d at 1308-09; *see also Albrecht v. Lund,* 845 F.2d 193, 195-96 (9th Cir. 1988)(holding dismissal without leave to amend is appropriate when the only question for the court to decide is purely a matter of law).

IV. RULING

The instant case is hereby DISMISSED without leave to file a Second Amended Complaint.

IT IS SO ORDERED.
Dated this 19 day of October, 2004.

/s/
S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. 04-4010 SJO (VBKx)

[Filed August 10, 2004]

ERNESTO R. VASQUEZ, Plaintiff,	)
v.	)
LOS ANGELES ("LA") COUNTY, DON KNABE, in his official capacity as a Supervisor, LA County, GLORIA MOLINA, in her official capacity as a Supervisor, LA County, VYONNE B. BURKE, in her official capacity as a Supervisor, LA County, ZEV YAROSLAVSKY, in his official capacity as a Supervisor, LA County, and MICHAEL D. ANTONOVICH, in his official capacity as a Supervisor, LA County, Defendants.	)

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. § 1983

Plaintiff, by and through his undersigned attorneys, brings this First Amended Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof alleges the following upon information and belief:

JURISDICTION

1. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

INTRODUCTORY STATEMENT

2. Plaintiff seeks a permanent injunction to enjoin Defendants from removing the cross from the County of Los Angeles Official Seal ("LA County Seal"), a declaration that Defendants' policy, practice, and/or custom to remove the cross from the LA County Seal violates Plaintiff's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, and a declaration that the LA County Seal, as adopted March 1, 1957, does not violate the United States Constitution or the California Constitution. Plaintiff also seeks an award of reasonable costs of litigation, including attorneys' fees and expenses, pursuant to 42 U.S.C. § 1988.

3. Plaintiff's claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court.

4. Plaintiff's prayer for relief regarding costs, including reasonable attorneys' fees, is authorized by 42 U.S.C. § 1988.

5. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claim occurred in this district.

PLAINTIFF

6. Plaintiff Ernesto R. Vasquez is an adult resident of Los Angeles County, California, a state and municipal taxpayer, and a citizen of the United States. Plaintiff Vasquez is a Los Angeles County employee, working for the Los Angeles County Department of Public Works. As such, Plaintiff Vasquez has daily contact with the LA County Seal.

7. Plaintiff Vasquez is a devout Christian, and he objects to Defendants' removal of the cross from the LA County Seal because this policy, practice, and/or custom conveys the impermissible state-sponsored message of disapproval of and hostility toward Christianity and sends a clear message to Plaintiff Vasquez and other Christians that they are outsiders, not full members of the LA County community. Additionally, Plaintiff Vasquez objects to the use of his tax money and the expenditure of municipal and/or state funds and tax dollars to support Defendants' anti-Christian policy, practice, and/or custom to remove the cross from the LA County Seal.

DEFENDANTS

8. Defendant Los Angeles County ("LA County") is a public entity capable of being sued. Defendant LA County has created, adopted, and intends to implement a policy, practice, and/or custom to remove the cross from the LA County Seal. This policy, practice, and/or custom conveys the impermissible state-sponsored message of disapproval of and hostility toward Christianity and causes the additional injury of an improper expenditure of municipal and/or state funds and tax dollars.

9. Defendants Don Knabe, Gloria Molina, Yvonne B. Burke, Zev Yaroslavsky, and Michael D. Antonovich are Supervisors for Defendant LA County and members of the LA County Board of Supervisors, which is the governing body for Defendant LA County. As Supervisors, Defendants Knabe, Molina, Burke, Yaroslavsky, and Antonovich are responsible for creating, adopting, and implementing the policies, practices, and customs of Defendant LA County, including the policy, practice, and/or custom to remove the cross from the LA County Seal. At all relevant times, Defendants Knabe, Molina, Burke, Yaroslavsky, and Antonovich were agents, servants, and/or employees of LA County, acting under color of state law as that phrase is used in 42 U.S.C. § 1983. Defendants Knabe, Molina, Burke, Yaroslavsky, and Antonovich are sued in their official capacities only.

STATEMENT OF FACTS

10. Defendant LA County officially adopted the LA County Seal on March 1, 1957. A true and accurate

copy of the LA County Seal is attached to this First Amended Complaint as Exhibit 1 and adopted herein by reference. The LA County Seal is displayed on county buildings, vehicles, flags, stationary, forms, commendations, uniforms, and elsewhere throughout LA County.

11. The LA County Seal, as adopted March 1, 1957, contains symbols of historical and cultural significance to the residents of LA County and does not convey an impermissible, state-sponsored religious message. Included in the LA County Seal is a small cross, which represents the influence of the church and the missions of California. The LA County Seal also includes the following: an image of the Goddess Pomona, the goddess of gardens and fruit trees, standing on the shore of the Pacific Ocean with the San Gabriel Mountains in the background; engineering instruments that relate to the industrial construction complex of LA County and LA County's contribution to the conquest of space; a depiction of the San Salvador, the Spanish galleon that Cabrillo sailed into San Pedro Harbor on October 8, 1542; a tuna that represents the fishing industry of LA County; a depiction of Pearlette, a championship cow, which represents the dairy industry; a depiction of the Hollywood Bowl, which indicates cultural activities, with two stars representing LA County's motion picture and television industry; and images of oil derricks that are symbolic of the oil fields that were discovered on Signal Hill. Surrounding the LA County Seal are the words "County of Los Angeles California."

12. On or about June 1, 2004, Defendants adopted the policy, practice, and/or custom of singling

out the cross for removal from the LA County Seal because it was a symbol that reflected the contributions of Christianity, thereby conveying the state-sponsored message of disapproval of and hostility toward Christianity and its historical and cultural significance to the citizens of LA County, including Plaintiff. Defendants, however, have not singled out the large and prominent image of the Goddess Pomona for such hostile and discriminatory treatment, thereby officially recognizing, endorsing, and finding favor with polytheism. Defendants' policy, practice, and/or custom sends a clear message to Plaintiff Vasquez and other Christians that they are outsiders, not full members of the LA County community.

13. Defendants' policy, practice, and/or custom to remove the cross from the LA County Seal was improperly influenced and continues to be improperly influenced by the American Civil Liberties Union, an organization that has a reputation for seeking to remove Christianity from the public square. While Defendants are cooperating and conferring with representatives from the American Civil Liberties Union regarding the removal of the cross, Defendants have refused to place this issue before the citizens of LA County for a vote, despite requests to do so.

14. The LA County Seal, as adopted March 1, 1957, does not convey an impermissible religious message; it conveys a historical and cultural message that is important to the residents of LA County, including Plaintiff. However, by creating and adopting a policy, practice, and/or custom that targets the cross for removal and exclusion as one of the historical and cultural symbols of the seal, Defendants have now

conveyed an anti-Christian religious message prohibited by the Establishment Clause.

15. Defendants' purpose for creating and adopting the policy, practice, and/or custom to target the cross for disparate and hostile treatment was anti-Christian and animated by hostility toward Christianity and its cultural and historical significance to the residents of LA County, including Plaintiff.

16. The effect of Defendants' policy, practice, and/or custom to target the cross for disparate treatment is to convey a message of disfavor of and hostility toward Christianity and thereby causing harm by sending a message to Christians, including Plaintiff Vasquez, that they are outsiders, not full members of the political community. Once this policy is implemented, this harmful and unconstitutional effect will be repeated each time the seal without the cross is displayed.

17. Defendants intend to implement their anti-Christian policy, practice, and/or custom and remove the cross from the seal, which will cause additional and repeated injury to Plaintiff Vasquez each day that he goes to work for LA County or is otherwise exposed to the anti-Christian message conveyed by the seal without the cross. As a consequence of Defendants' anti-Christian policy and its implementation, Plaintiff Vasquez will alter his behavior to avoid this additional, direct injury. Moreover, Defendants' anti-Christian policy, practice, and/or custom is funded by and will result in the expenditure of thousands of municipal and/or state funds and tax dollars, causing further direct injury to Plaintiff Vasquez.

18. Defendants' policy, practice, and/or custom to target the cross for removal from the LA County Seal, while leaving in place the prominently displayed Goddess Pomona, demonstrates an anti-Christian purpose, conveys a message to Christians that they are outsiders, not full members of the political community, and fosters an excessive entanglement with religion. By adopting their anti-Christian policy, practice, and/or custom, Defendants are taking sides in a matter that touches upon religion. By adopting their anti-Christian policy and officially recognizing, endorsing, and finding favor with polytheism, Defendants are taking an official position on religious doctrine and conveying a state-sponsored message that disfavors Christianity.

CLAIM FOR RELIEF

(Establishment Clause)

19. Plaintiff hereby incorporates by reference all above paragraphs.

20. By reason of the aforementioned policy, practice, custom, acts, and omissions, engaged in under color of state law, Defendants have violated the Establishment Clause of the First Amendment to the United States Constitution as applied to the states and their political subdivisions under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

21. As a direct and proximate result of Defendants' violation of the Establishment Clause,

Plaintiff Vasquez has suffered irreparable harm, including the loss of his constitutional rights.

WHEREFORE, Plaintiff asks this Court:

A) to enjoin Defendants, their employees, agents, and successors in office from removing the cross from the LA County Seal, as described herein;

B) to enter judgment declaring that Defendants' policy, practice, and/or custom to remove the cross from the LA County Seal, as described herein, violates the Establishment Clause of the United States Constitution;

C) to enter judgment declaring that the LA County Seal, as adopted March 1, 1957, does not violate the United States Constitution or the California Constitution;

D) to award Plaintiff his reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988 and other applicable law;

E) to grant such other and further relief as this Court should find just and proper.

Respectfully submitted this 10th day of August, 2004.

THOMAS MORE LAW CENTER

By: /s/_____
Charles S. LiMandri
Robert J. Muise*

Edward L. White III*
*Subject to admission *pro hac vice*

Counsel for Plaintiff

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(2)

No. 07-427

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OCT 29 2007
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ERNESTO R. VASQUEZ,

Petitioner,

v.

LOS ANGELES COUNTY, DON KNABE, GLORIA MOLINA, YVONNE B. BURKE, ZEV YAROSLAVSKY & MICHAEL D. ANTONOVICH, in their official capacities as Supervisors, LA County,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

JENNIFER A.D. LEHMAN
Counsel of Record
OFFICE OF THE COUNTY COUNSEL
RAYMOND G. FORTNER, JR.
COUNTY COUNSEL
500 WEST TEMPLE STREET, SIXTH FLOOR
LOS ANGELES, CA 90012
TEL: (213) 974-1908
FAX: (213) 626-2105

Counsel for Respondents

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

1) Whether this Court should review the Ninth Circuit's holding that a county's decision to redesign its municipal seal and remove a Latin cross, among other symbols, failed to state a cognizable claim under the Establishment Clause?

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Fed. R. Civ. P. 12(b) 3, 6

INTRODUCTION

This case is about whether an individual has the right to dictate by way of litigation what historical or cultural symbols a county can place on its municipal seal. In redesigning its municipal seal, Respondents County of Los Angeles and County Supervisors Don Knabe, Gloria Molina, Yvonne B. Burke, Zev Yaroslavsky, and Michael D. Antonovich (collectively "Respondents") included certain historical and cultural symbols and eliminated others. This decision is, and should be, within the Board's discretion.

Respondents chose to redesign the County seal to exclude a symbol which some courts have found unconstitutional. Among other changes, the County replaced a Latin cross with a depiction of a mission.[1] The Ninth Circuit properly found that Petitioner failed to state an Establishment Clause violation because the Respondents' redesign: (1) had a secular purpose; (2) had a secular effect; and (3) did not foster excessive entanglement with religion.

Petitioner seeks review of the Ninth Circuit's decision on the grounds that the ruling "eviscerates claims advanced under a hostility" theory and because Establishment Clause jurisprudence allegedly "is in disarray." In *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005), this Court reaffirmed the viability of the

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[1] The constitutionality of the Latin cross on the former Los Angeles County seal is not at issue in this case. The question is whether the County's decision to redesign the seal violated the Establishment Clause.

Lemon v. Kurtzman test for Establishment Clause issues. Both the Ninth Circuit and the district court properly applied the *Lemon* principles and made the correct ruling consistent with Establishment Clause jurisprudence. As such, review is not warranted and the petition should be denied.

STATEMENT OF THE CASE

According to Petitioner Ernesto Vasquez's First Amended Complaint, Los Angeles County adopted a County seal on March 1, 1957, that included various symbols of historic and cultural significance to the residents of Los Angeles County. (App. D[2], p. 57a,¶ 11.) The seal contained depictions of Pomona (the goddess of gardens and fruit trees); engineering instruments; a Spanish galleon; a tuna; a cow; a depiction of the Hollywood Bowl; two stars representing the motion picture industry; images of oil derricks; and a Latin cross. (App. B, p. 5a; App. D, p. 57a, ¶ 11.) Vasquez alleges that the Latin cross represented the influence of the church and the missions in California. (App. D, p. 57a, ¶ 11.) He alleges that the symbols on the former seal did not convey any impermissible religious message, and sent only a "historical and cultural message." (App. D, p. 57a, ¶ 11; pp. 58a-59a, ¶ 14.)

On June 1, 2004, the County decided to redesign the seal. (App. D, pp. 57a-58a, ¶ 12.) The symbols of Pomona, the cross, and the oil derricks were replaced by a Native American woman holding a basket and an

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[2] The appendices referred to in this Brief are attached to Vasquez's Petition.

image of Mission San Gabriel, a California mission. (App. B, p. 5a; App. C, pp. 32a-33a.)

Even though Vasquez contends that the former seal contained a historical and cultural message, (App. D, p. 57a, ¶ 11; pp. 58a-59a, ¶ 14), he alleges that the decision to redesign the seal without a cross sends a message of hostility toward Christians in violation of the Establishment Clause. In other words, Vasquez claims that a seal with a cross does not constitute an Establishment Clause violation; however, a seal that does not contain a cross, does in fact create such a violation.

Vasquez filed suit under 42 U.S.C. § 1983 against Respondents alleging a violation of the Establishment Clause. (App. D., p. 56a ¶ 9; pp. 60a-61a, ¶¶ 20, 21.) Respondents moved to dismiss in the district court pursuant to Federal Rule of Civil Procedure 12(b). The district court granted the motion and found that Vasquez lacked standing and failed to state a cognizable claim under the Establishment Clause. (App. C, pp. 29a-52a.) The Ninth Circuit disagreed with the trial court's ruling on the standing issue, but affirmed that Vasquez failed to state a cognizable claim under the Establishment Clause. (See App. B generally.) Vasquez now seeks review in this Court.

REASONS TO DENY THE WRIT PETITION

I. THE NINTH CIRCUIT PROPERLY APPLIED THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE AND FOUND THAT PETITIONER FAILED TO STATE A COGNIZABLE CAUSE OF ACTION.

A. The County's Decision to Design A New Seal Is Appropriately Within Its Discretion.

Initially, California Government Code § 25000 *et. seq.* grants county board of supervisors broad legislative powers, including the power to adopt a county seal. *See* Cal. Govt. Code § 25004. A county board of supervisors is entitled to exercise its discretion in making resolutions and ordinances. *Cosgrove v. County of Sacramento*, 252 Cal.App.2d 45, 50 (1967). Once exercised, legislative discretion is, absent special circumstances, not subject to judicial control or supervision. *California Ass'n. of Professional Employees v. County of Los Angeles*, 74 Cal.App.3d 38, 43 (1977).

In this case, the Los Angeles County Board of Supervisors' decision regarding which historical or cultural symbols are contained in its municipal seal is entirely within its discretion.

B. The Ninth Circuit's Holding is Consistent with Other Establishment Clause Cases.

Vasquez alleges that the removal of the cross from the County seal constitutes hostility toward

Christianity in violation of the Establishment Clause. The Establishment Clause of the First Amendment mandates governmental neutrality between religion and non-religion, as well as between the various religions. *McCreary County v. ACLU,* 545 U.S. 844, 859 (2005); *Epperson v. Arkansas*, 393 U.S. 97, 103-104 (1968). It prohibits government fr m appearing to take a position on religion or from making adherence to a religion relevant in any way to a person's standing in the community. *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989).

Vasquez argues in his Petition that this Court should grant review because current Establishment Clause jurisprudence does not adequately address hostility claims. While Respondents agree that there appears to be more case law on alleged religious preference than on alleged religious hostility, existing case law on hostility adequately addresses the issue and review is not warranted.

The Establishment Clause applies to acts which promote a particular religion, and also to acts which disapprove of, or are hostile toward, religion. *American Family Ass'n. v. City and County of San Francisco*, 277 F.3d 1114, 1120-1121 (9th Cir. 2002), *cert. denied*, 537 U.S. 886 (2002); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Wallace v. Jaffee*, 472 U.S. 38, 56 (1985). In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court established a test for analyzing government conduct under the Establishment Clause. Under the "*Lemon* test," government action complies with the Establishment Clause if it: (1) has a secular purpose; (2) its principal or primary effect neither advances nor inhibits

religion; and (3) it does not foster excessive government entanglement with religion. *Id.* at 612-613. While the *Lemon* test has been called into question in the past, in *McCreary County v. ACLU*, 545 U.S. 844, 859 (2005), this Court reaffirmed its application to Establishment Clause questions. *See generally McCreary*, 545 U.S. at 844.

The Ninth Circuit properly applied the *Lemon* test to the case at hand and correctly found that Vasquez failed to state a cognizable claim against Respondents under the Establishment Clause.

1. Secular Purpose

First, the Ninth Circuit properly found that removing the cross from the seal had a secular purpose. The purpose inquiry asks whether the purpose of the government action is to endorse or disapprove of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585. (1987). A secular purpose has to be genuine and not merely secondary to a religious objective. *McCreary,* 545 U.S. at 864. When there are both religious and legitimate secular purposes motivating government conduct, the existence of the secular purpose will satisfy the first *Lemon* prong. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

Vasquez claims in his Petition that the Court improperly attributed a secular purpose to Respondents, and that Respondents' claim of neutrality is simply a sham. In ruling on 12(b) motions, courts need not accept as true unreasonable inferences or conclusory allegations of law. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.

1981), *cert. denied*, 454 U.S. 1031 (1981). "The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act." *McCreary,* 545 U.S at 862. Contrary to Vasquez's argument, courts have correctly tested Establishment Clause issues at an early stage. *See American Family*, 277 F.3d at 1121-22; *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1258-60 (10th Cir. 2005); *McGinley v. Houston*, 361 F.3d 1328, 1332, (11th Cir. 2004), *cert. denied*, 540 U.S. 1000 (2003). In this case, the County's secular purpose is evident, not only from Vasquez's own allegations, but from the case law that has deemed the presence of crosses on municipal seals to be unconstitutional.

Initially, Vasquez's own Complaint defeats his claim. He alleges that the symbols on the seal, including the cross, do not convey any improper religious message, and are historical and cultural symbols. (App. D, p. 57a, ¶ 11; pp. 58a-59a, ¶ 14.) If the presence of the cross on the seal does not send a religious message, it defies reason that its removal could be construed as hostility toward religion. Vasquez also alleges in his Complaint that Respondents' decision was motivated by the threat of litigation by the American Civil Liberties Union. (App. D, p. 58a, ¶ 13.) A desire to avoid litigation is a secular purpose. Further, Vasquez alleges that the cross symbolized the influence of the church and the missions in California. (App. D, p. 57a, ¶ 11.) The new County seal contains a symbol of a mission. (App. A, p. 5a.) These allegations fail to support any reasonable

inference that Respondents' decision was motivated by hostility toward Christianity.

Further, when faced with Establishment Clause issues, courts must be reluctant to attribute unconstitutional motives to government actors where there is a plausible secular purpose. *American Family, supra,* 277 F.3d at 1120. Governments are required to maintain neutrality in religious matters. *See Epperson, supra,* 393 U.S. at 103-104. Case law holds that the presence of a cross on a municipal seal may violate the Establishment Clause. *See, e.g., Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (cross displays and city insignia with cross found to violate Establishment Clause); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (cross on seal found to violate Establishment Clause); *Friedman v. Board of County Comm. of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (seal with golden latin cross found to violate Establishment Clause); *ACLU v. Stow*, 29 F.Supp.2d 845 (N.D. Ohio 1998) (cross on City seal found to violate Establishment Clause); *Robinson v. City of Edmond,* 68 F.3d 1226 (10th Cir. 1995), *cert. denied*, 517 U.S. 1201 (1996) (presence of Latin cross on city seal found to violate Establishment Clause); *but see Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991) (cross on City insignia held not to violate Establishment Clause).

In this case, no clearer plausible secular purpose could exist than the County seeking to **avoid** a potential Establishment Clause violation, and affirm its neutrality by redesigning its seal. Given the above, the Ninth Circuit properly found that Vasquez failed to satisfy the first *Lemon* prong.

2. Primary Effect

The second question of the *Lemon* test considers whether the government action advances or inhibits religion. *Lemon, supra,* 403 U.S. at 612. The question is not whether any person might perceive an action to reflect official disapproval of a religious choice. "Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement." *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. 1, 35 (2004) (O'Connor, J, concurring). The question is analyzed from the perspective of a "reasonable, objective observer" who is informed and familiar with the history of the government practice at issue. *American Family, supra,* 277 F.3d at 1122.

The Ninth Circuit properly found that Vasquez failed to state a claim under the second prong as well. A reasonable observer who is informed and familiar with the history of the county seal would not view Respondents' redesign of the seal as an act of hostility toward religion. This is especially true given that the presence of crosses on other municipal seals have been found to be unconstitutional. *See, e.g., Robinson,* 68 F.3d at 1232; *Harris*, 927 F.2d at 1413; *Friedman,* 781 F.2d at 778; *but see Murray,* 947 F.2d at 163.

Simply because government conduct is directed at religious material does not mean it automatically has a hostile effect. In *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert. denied* 505 U.S. 1218 (1992), the Tenth Circuit held that removal of two religious books from the classroom shelves, and instructing a teacher to keep his bible out of sight during classroom hours

did not violate the Establishment Clause. The Court noted:

> The mere fact that the actions were aimed exclusively at Christian religious materials does not automatically mean the actions' primary effect was to send a disapproving message toward Christianity.

Id. at 1055; *see also Walz v. Egg Harbor Township*, 187 F.Supp.2d 232 (D. N.J. 2002), *aff'd* 342 F.3d 271 (3d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004) (prohibiting student from distributing religious pencils and candy during class did not constitute hostility toward religion in violation of the Establishment Clause).

The Ninth Circuit properly evaluated the second *Lemon* prong. A reasonable, objective, and informed observer would find that the decision to redesign the County seal, as well as the existence of a seal without a cross, does not have the primary effect of advancing or inhibiting religion.

3. Excessive Entanglement

The third prong of the *Lemon* test asks whether the government act fosters excessive entanglement between government and religion. *Lemon, supra,* 403 U.S. at 612-613. The entanglement prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs. *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1399 (9th Cir. 1994), *cert. denied*, 513 U.S. 1000 (1994). The Ninth Circuit properly rejected Vasquez's

argument that removal of the cross from the seal caused a cognizable claim of excessive entanglement.

II. THE COURT'S RULING DOES NOT PROMOTE HOSTILITY TOWARD RELIGION AND ANY CONTRARY OPINION WOULD MAKE IT VIRTUALLY IMPOSSIBLE TO BE NEUTRAL.

Vasquez claims in his Petition that should this Court permit the Ninth Circuit's decision to stand, it "would pave the road for removing all religious imagery or references from official recognition because they represent religion." (Petition, p. 8.) However, as Vasquez points out in his Petition, this Court has already made clear that simply having religious content or promoting a message consistent with a religious doctrine does not equate with a violation of the Establishment Clause. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 212 (1963); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005).

Further, and in any event, the law does not charge government entities with a requirement to recognize religion in their municipal seals. Vasquez essentially argues that once a county has chosen to recognize a symbol that may have some religious significance, the county is bound to retain that symbol in perpetuity because removal would constitute hostility. As discussed above, the law does not support this position. As set forth in *McGinley v. Houston,* 282 F.Supp.2d

1304 (M.D. Ala. 2003), *aff'd* 361 F.3d 1328 (11th Cir. 2004), *cert. denied*, 540 U.S. 1000 (2003):

> [The Supreme] Court has made clear that the neutrality mandated by the establishment clause does not itself equate with hostility towards religion. [Citations omitted]. It does not 'accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion.' [Citations omitted] **To hold that the government cannot endorse religion does not 'manifest a governmental hostility to religion** or religious teachings ...'

Id. at 1308. (Emphasis added.) Current Establishment Clause jurisprudence adequately addresses these issues. As such, this case does not merit consideration by this Court.

CONCLUSION

For the foregoing reasons, Respondents ask that this Court deny the petition for a writ of certiorari.

DATED: October 29, 2007

Respectfully submitted,

Jennifer A.D. Lehman
Counsel of Record
Office of the County Counsel
Raymond G. Fortner, Jr.
County Counsel
500 West Temple Street, Sixth Floor
Los Angeles, CA 90012
Tel: (213) 974-1908
Fax: (213) 626-2105

Counsel for Respondents

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No. 07-427

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ERNESTO R. VASQUEZ,
Petitioner,

v.

LOS ANGELES COUNTY ("LA County"), DON KNABE, GLORIA MOLINA, YVONNE B. BURKE, ZEV YAROSLAVSKY, and MICHAEL D. ANTONOVICH, in their official capacities as Supervisors, LA County,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

ROBERT JOSEPH MUISE
Counsel of Record
THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DRIVE
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001
Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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STATEMENT IN REPLY

Respondents claim that "[t]his case is about whether an individual has the right to dictate by way of litigation what historical or cultural symbols a county can place on its municipal seal." Br. in Opp'n at 1. And they are correct.

As Respondents acknowledge, under this Court's current Establishment Clause jurisprudence, litigants have frequently, and often successfully, "dictate[d] by way of litigation" what symbols can appear on government property, including municipal seals. *See* Br. in Opp'n at 8 (citing cases). The courts have held that such litigants have standing because they are essentially offended by the symbol, thereby permitting them to "dictate" through the courts what symbols are allowed to appear on public property, seals, and insignia. *See, e.g.,* Br. in Opp'n at 8. Consequently, an even-handed application of this Court's Establishment Clause jurisprudence, flawed as it may be, compels a summary reversal in this case.

Indeed, the Ninth Circuit held that Petitioner Vasquez had standing to pursue this litigation, stating, "If we assume for the moment that the revised seal did, in fact, convey an anti-Christian message, then it is understandable that Vasquez would feel aggrieved by that message. He should, accordingly, be able to seek a legal remedy. . . . In short, Vasquez has alleged a sufficiently concrete injury arising out of his direct contact with the purportedly offensive anti-religious symbol at issue in this case." App. 12a-13a. Accordingly, the allegations in the complaint that grant Petitioner Vasquez standing to pursue his

constitutional claim also demonstrate that the Ninth Circuit erred by dismissing his complaint under Federal Rule of Civil Procedure 12(b)(6).[1]

According to this Court, the United States Constitution forbids hostility toward any religion. In fact, in its Establishment Clause cases, this Court has often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or of religion in general. Based on this established principle of law, it is evident that Petitioner Vasquez has stated a claim because the government policy decision at issue singled out a *particular* religious symbols for removal from public places *because it was Christian* in violation of the First Amendment.

In the final analysis, this Court should grant review of this case and summarily reverse the Ninth Circuit based on current jurisprudence *or*, more importantly, grant review and abandon its unworkable tests in favor of a view of the Establishment Clause that produces results consistent with our Nation's religious heritage—a view which underlies the First Amendment itself. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment) ("What a strange notion, that a Constitution which itself gives

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[1] As Respondents point out, the district court dismissed Petitioner Vasquez's claim for lack of standing. Br. in Opp'n at 3. The Ninth Circuit, apparently concerned with upsetting precedent for future cases challenging religious symbols, reversed the district court on this issue. App. 8a-17a.

'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general.").

ARGUMENT IN REPLY

I. Respondents' Policy Decision to Remove the Small Cross *Because It Is a Christian Symbol* Is Subject to Judicial Review.

Respondents seem to suggest that their official policy decision to remove the small cross because it is a Christian symbol should be immune from constitutional challenge because "[o]nce exercised, legislative discretion is . . . not subject to judicial control or supervision." Br. in Opp'n at 4. Respondents are mistaken.

The challenged policy decision here, which singled out a Christian symbol for disfavored treatment, is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that Christian symbols, such as the cross, had to be excluded and banned from such public display. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that a school official's decision to permit a member of the clergy to give an invocation and benediction at the school's graduation ceremony was "a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur").

And while the government may have discretion to act in certain areas, it is axiomatic that its actions must comport with the requirements of the

Constitution, including the Establishment Clause. Indeed, there are numerous cases, too many to cite here, in which courts have held discretionary governmental actions unconstitutional, *see, e.g.*, Br. in Opp'n at 8 (citing cases), including cases challenging the government's "discretionary" act to select symbols for its official seal. *See Friedman v. Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (holding unconstitutional a county's seal); *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991) (same).

II. Petitioner's Challenge to Respondents' Policy Decision to Remove the Small Cross *Because It Is a Christian Symbol* Advances a Claim under the Establishment Clause.

The Establishment Clause "forbids hostility toward any" religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Indeed, this Court has long observed, "In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532 (1993).

Accepting as true all material allegations in the complaint, as required, there can be no dispute that Respondents' official purpose for removing the cross was to disapprove of a particular religion—Christianity. *See* App. 57a-58a. Moreover, this policy decision had the effect of conveying a state-sponsored message of disfavor of the Christian religion. *See* App. 57a-58a. Therefore, Petitioner Vazquez has stated a claim under the Establishment Clause.

Like a polite, public greeting a politician may give to acknowledge the presence of a much hated political adversary, the courts often politely acknowledge the existence of a hostility toward religion claim under the Establishment Clause. However, this acknowledgment is often superficial and meaningless—as demonstrated by this and other cases. *See, e.g., Vernon v. City of Los Angeles,* 27 F.3d 1385, 1396 (9th Cir. 1994) (stating that "[t]he government neutrality required under the Establishment Clause is . . . violated as much by government disapproval of religion as it is by government approval of religion," but finding no violation); *American Family Ass'n v. City & County of San Francisco,* 277 F.3d 1114, 1124 (9th Cir. 2002) (acknowledging hostility claim, but finding no violation); *O'Connor v. Washburn Univ.*, 416 F.3d 1216 (10th Cir. 2005) (acknowledging hostility claim, but finding no violation).

In the final analysis, there is much confusion in the lower federal courts as to the application of the Establishment Clause, particularly in cases advancing a "hostility" theory. A confusion that only this Court can clarify. *See* App. 23a ("We have noted that because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group, we have little guidance concerning what constitutes a primary effect of inhibiting religion.") (internal quotations and citation omitted). Accordingly, this case presents an opportunity for the Court to clarify its Establishment Clause jurisprudence in the context of reviewing for the first time a case involving hostility toward religion.

CONCLUSION

As this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and abandon its much maligned jurisprudence in favor of a workable standard that is consistent with our Nation's religious heritage and capable of consistent application.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT JOSEPH MUISE
Counsel of Record
Thomas More Law Center
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, Michigan 48106

Counsel for Petitioner